

2008

# Valerie J. Connell v. Harold G. Connell : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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VALERIE J. CONNELL,

Petitioner/Appellant,

v.

HAROLD G. CONNELL,

Respondent/Appellee.

**Brief of Appellant  
Valerie J. Connell**

Appellate Case No. 20080619-CA

District Court Case No. 024400765

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Appeal from the Fourth Judicial District Court, Utah County, Utah  
The Honorable Claudia Laycock, District Court Judge

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## **JURISDICTION**

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(h).

## **ISSUES AND STANDARDS OF REVIEW**

Appellant Valerie Connell (“Valerie”) presents the following issues in her appeal:

1. After establishing that Valerie had a need for support because her monthly expenses exceeded her income by more than \$2,500.00, did the trial court abuse its discretion in refusing to award Valerie alimony despite her demonstrated need and in awarding Respondent Mr. Connell (“Harold”) a credit for past alimony paid based solely on a comparison of the parties’ monthly incomes? (Issue preserved: R. 1914-20.)

a. Did the trial court’s refusal to enforce sanctions against Harold for failing to produce discoverable documents result in prejudice to Valerie such that she is entitled to a new trial to determine the parties’ income, assets, and debts?

*Standard of Review:* “In exercising its discretion in determining the amount of alimony to be awarded, the trial court must consider the financial condition and needs of the spouse claiming support, the ability of that spouse to provide sufficient income for him or herself, and the ability of the responding spouse to provide support. Failure to consider these factors constitutes an abuse of discretion.” *Stevens v. Stevens*, 754 P.2d 952, 958 (Utah Ct. App. 1988). Even if the required factors have been considered, an award may be reversed by showing that “a serious inequity has resulted as to manifest a clear abuse of discretion.” *Schindler v. Schindler*, 776 P.2d 84, 90 (Utah Ct. App. 1989).

2. Did the trial court err in awarding less than 15% of Valerie’s attorney fees incurred in both the divorce and bankruptcy proceedings when the record clearly

established that Harold displayed “a distinct pattern of withholding, evading and avoiding discovery and ... repeatedly failed to comply with court orders,” thereby costing Valerie “a great deal in attorney’s fees and delays”? (Issue Preserved: R. 1894-98.)

*Standard of Review:* “A trial court has discretion to award attorney fees.” *Finlayson v. Finlayson*, 874 P.2d 843, 850 (Utah Ct. App. 1994). To challenge a finding of fact, the appellant must “marshal the evidence in support of the findings and then demonstrate that, despite this evidence, the trial court’s findings are so lacking in support as to be against the clear weight of the evidence.” *Gray v. Oxford Worldwide Group, Inc.*, 2006 UT App 241, ¶ 8, 139 P.3d 267.

3. Did the court err in finding Valerie’s request for nanny care unreasonable despite the undisputed evidence that her job requires that she be gone from home ten hours per day and that she leave her five minor children at least once per month for business trips, which average three to six days per trip? (Issue Preserved: R. 1920-23.)

*Standard of Review:* To challenge a finding of fact, the appellant must “marshal the evidence in support of the findings and then demonstrate that, despite this evidence, the trial court’s findings are so lacking in support as to be against the clear weight of the evidence.” *Gray*, 2006 UT App 241 at ¶ 8.

4. Did the trial court err in refusing to award Valerie any portion of the \$64,000.00 paid solely by her on the parties’ home mortgage after the parties separated and which Harold refused to pay, when the trial court did not have jurisdiction over the marital residence due to Harold’s bankruptcy and therefore could not fix the parties’ interests in the property? (Issue Preserved: R. 1936-37.)

*Standard of Review:* A trial court's property division determination may be reversed if "there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." *Thomas v. Thomas*, 1999 UT App 239, ¶ 16, 987 P.2d 603 (internal quotations omitted).

5. Did the trial court err in ruling that Valerie had not raised or reserved the issue of back child support when her Complaint requested that child support commence November 1, 2001, and the trial court held in its July 2002 Order that Valerie "reserves the right to argue retroactivity of support"? (Issue Preserved: R. 4, 81, 1911-12.)

*Standard of Review:* To challenge a finding of fact, the appellant must "marshal the evidence in support of the findings and then demonstrate that, despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence." *Gray*, 2006 UT App 241 at ¶ 8.

## **DETERMINATIVE STATUTES AND RULES**

- (1) Utah Code Ann. § 30-3-3 (2002), attached hereto as Addendum E; and
- (2) Utah Code Ann. § 30-3-5 (2002), attached hereto as Addendum F.

## **STATEMENT OF THE CASE**

### **1. Nature of the Case:**

This is an appeal from the Amended Decree of Divorce issued by the Fourth District Court in the divorce proceedings of Valerie and Harold Connell.

### **2. Course of Proceedings and Disposition Below:**

On April 4, 2002, Valerie filed a Complaint for Divorce with the Fourth Judicial

District Court for the State of Utah. (R. 5.) Valerie's Complaint sought permanent care, custody, and control of the parties' six minor children, subject to Harold's right to supervised visitation; requested an order of child support and alimony, commencing November 1, 2001; and sought division of the marital assets and debts. (R. 1-5.) Valerie also requested an award of attorney fees incurred in the divorce proceedings. (R. 1-2.)

On July 9, 2002, the trial court awarded Valerie temporary custody of her six children, recognizing "[t]here is an issue regarding the extent and number of incidences of sexual molestation and whether [Harold] is a danger to the children." (R. 87.) Based upon that issue and the stipulation of the parties, the court allowed Harold "supervised visitation" and ordered him to take a polygraph and continue certain psychosexual testing, stating that the issue of supervised visitation could be reviewed upon a request of either party after the testing was completed. (R. 86-87.)

The July 2002 Order required Harold to begin paying \$1,797 in child support and \$230 in alimony per month, specifically reserving the issue of retroactive support. (R. 86.) Harold was ordered to pay the parties' car insurance and to maintain Valerie's and the children's health insurance. (*Id.*) Each party was required to pay one-half of all unreimbursed medical expenses and work-related child care expenses after Valerie obtained employment. (R. 84, 86.) The court also awarded temporary possession of personal property, with the express order that both parties were restrained from "dissipating, encumbering, or hiding assets" during the divorce proceeding. (R. 85.)

Despite this Order, and several subsequent orders from the trial court, Harold continually refused to produce records related to his polygraph and psychosexual testing.

(R. 378-79; 601; 700-02; 1070-72; 2262:180-198.) Harold also refused to comply with discovery requests concerning his financial status, including document requests which sought evidence of his income and expenses and the financial status of his new wife. As a result, Valerie was compelled to seek the trial court's intervention and enforcement on several occasions. (R. 700-02, 817-21, 1273-1316, 1563-1712, 1757-60.) Harold also failed to pay the court ordered child support, alimony, day care expenses, medical expenses, and health and car insurance premiums, forcing Valerie to bring numerous orders to show cause seeking to recover the amounts owed. (R. 400-01; 600-01; 700-02; 1019-20; 1070-72; 1340-41; 1448-49; 1817-19; 2262:143-45.) As a result of Harold's continuous violations of its orders, the trial court found him in contempt on multiple occasions. (R. 817-821; 1335-38; 1817-19; 2261:44.) Indeed, due to the ongoing nature of his conduct, the trial court sanctioned Harold by ordering him to serve a five-day jail sentence in May 2005. (R. 819.) Although the trial court initially stayed this sentence "due to the county jail being near capacity and only for that reason," (*id.*), the court reissued that sentence on November 14, 2006, only one week prior to the first day of trial, due to Harold's continued failure to comply with the court's orders. (R. 2261:44.)

After over 4 ½ years of protracted litigation, during which the trial court found Harold had displayed a "distinct pattern of withholding, evading and avoiding discovery and .... repeatedly fail[ing] to comply with court orders," (R. 2160), the trial court ultimately set the trial date for November 22, 2006. (R. 1441.) The court held that this date was "set in concrete" and refused to continue the trial even though it had found that Harold had still not completely responded to Valerie's discovery requests, thereby

preventing Valerie from deposing him and his new wife before trial. (R. 2261:45, 48.) However, because the court found that Harold's hands "are very unclean" due to his "unvarying pattern in this case" "to duck and to evade and to avoid and to withhold," (R. 2261:43-44), it ordered, just one week before trial, that: "[i]f it turns out that we get to trial and [Valerie] is unable to present the necessary evidence based on [Harold's] failure to provide the necessary evidence through the discovery, I'm going to make the ruling that [Harold] will be precluded from defending on that issue." (R. 2261:45.)

The four day trial began on November 22, 2006, and concluded on December 20, 2006. (R. 2262-2265.) The trial court did not enter its Memorandum Decision until May 29, 2007, (R. 2026-87), and its Amended Findings of Fact and Conclusions of Law and Amended Decree of Divorce until June 24, 2008, copies of which are attached hereto as Addendum A, B, and C, respectively. (R. 2096-2151; 2152-2217.)

In its Amended Decree of Divorce, the court refused to award Valerie any future alimony based on its finding that Valerie earned about \$675 per month more than Harold. (R. 2177.) In so finding, the trial court refused Valerie's request to impute income to Harold based on the salary he was earning just four months prior to the parties' final separation. (R. 2183.) And, in addition to refusing to grant Valerie future alimony in any amount, the trial court also granted Harold's request for a credit of all alimony paid to Valerie after she obtained employment in November 2003. (R. 2175-76.)

With respect to Valerie's request for attorney fees, the trial court again found that Harold "has displayed a distinct pattern of withholding, evading and avoiding discovery and that he has repeatedly failed to comply with court orders.... [Harold's] intentional

efforts to thwart discovery have increased [Valerie's] attorney's fees *substantially* and [the court] will, therefore, increase her award of attorney's fees accordingly." (R. 2160 (emphasis added).) But the trial court then awarded Valerie less than 15% of the attorney fees incurred in both the divorce and bankruptcy cases,<sup>1</sup> declaring that the fees "are not reasonable, but are truly beyond reason for a marital estate of this size." (R. 2155, 2157.)

Rejecting Valerie's request for an award of one-half of the expenses to hire a full-time nanny to take care of the minor children during Valerie's ten-hour work days and during the three to six days she is away from the home each month on required business trips, the trial court found that the "infrequency" of Valerie's required travel did not justify the expense of a nanny. (R. 2186-87.)

With respect to Valerie's request that she be granted an award in the amount of \$64,000.00 for the payments she had been forced to make on the mortgage for the marital residence, the trial court simply declared that Valerie "received the benefit and comfort of living in the home and should not be granted judgment against [Harold] for having made the payments on the home." (R. 2205.)

Finally, with respect to Valerie's request for back child support for the period of October 1, 2001, to April 1, 2002, during which time Valerie "was forced to solely provide for all of the children and family living expenses from her own funds ... even though she was not working," the trial court erroneously concluded that, "[a]s far as the

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<sup>1</sup> Valerie testified at trial that she had hired other attorneys prior to engaging Mr. Thayer as her legal counsel in the divorce case and that she paid approximately \$12,000.00 in attorney fees in addition to the fees charged by Mr. Thayer. (R. 2262:208-09.) However, the trial court did not include those fees when reaching its award. (R. 2156, 2023.)



court can determine, this matter has never been brought before the court and has not been reserved by [Valerie].” (R. 2171-72.)

It is from these rulings that Valerie appeals.

## STATEMENT OF FACTS

### 1. The Parties’ Marriage

Valerie and Harold were married on November 22, 1986. (R. 5). At that time, Valerie had one daughter, whom Harold later adopted. (R. 2216.) The parties also had six biological children during their marriage. (*Id.*) Valerie had been employed for several years at the beginning of the marriage, (R. 2262:261-65), but she became a full-time mother to her then five young children in 1995.<sup>2</sup> (R. 2262:264.) At that time, Harold became the family’s sole provider. (*Id.*; R. 2263:378.)

By 2001, the parties’ seven children were 19, 13, 10, 7, 5, 3, and 1 years old. (R. 2216). During that year, the parties’ marriage deteriorated, and they separated several times beginning in May 2001. (R. 2262:38-39.) In June 2001, Harold voluntarily quit his \$95,000.00 per year<sup>3</sup> position at Novell to begin working for the Corporation of the Presiding Bishopric (the “CPB”), at an annual salary of only \$65,000.00. (R. 2262:141-42; 2263:385, Pl.’s Ex. 18.) Valerie testified that, while it did not matter to her where Harold worked, she had objected to Harold’s unilateral decision to quit his Novell position because of the substantial loss of income. (R. 2262:142.) Despite Valerie’s

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<sup>2</sup>Valerie testified that between 1995 and 2001, she did a few consulting jobs to earn income, earning about \$3,000 total between 1999 and 2001. (R. 2262: 264, 266-67.)

<sup>3</sup> Harold’s 2001 W-2 showed that, as of June 2001, Harold had earned \$47,879.77 from Novell. (Pl.’s Ex. 18.) Thus, his total yearly salary for 2001 would have been over \$95,000.

objections, Harold began working for the CPB in June 2001.<sup>4</sup> (R. 2262:142; 2263:385.)

After multiple separations, the parties permanently separated in October 2001, when Valerie asked Harold to leave their home after learning that he had molested their children. (R. 2262:38-39, 221; R. 2263:329.) At that time, Harold had not been depositing his paycheck into the parties' joint account. (R. 2265:737.) Thus, until the parties stipulated to an order in May 2002, Valerie received no support from Harold, with the exception of one check for \$2,000, leaving Valerie, who was unemployed, to pay all of the family's monthly expenses, including the nearly \$1,200.00 per month first mortgage on the marital residence. (R. 2262:44, 131, 225, 266-67; R. 2265:737; Pl.'s Ex. 9.)

## **2. The Divorce Proceedings**

On April 4, 2002, Valerie filed her Complaint for Divorce with the Fourth Judicial District Court. (R. 1-5.) In her Complaint, Valerie sought, *inter alia*, child support, alimony, attorney fees, and the permanent custody of the children, subject to Harold's right to supervised visitation. Valerie simultaneously moved for an order of temporary support and temporary custody subject to limited supervised visitation by Harold. (R. 8-12.) At that time, Valerie had very little to support herself and her children and could not meet the family's monthly marital obligations. (R. 9-12.)

In its Order on Order to Show Cause, entered July 9, 2002, the trial court awarded Valerie temporary custody of the children subject to Harold's right to supervised

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<sup>4</sup> Harold subsequently left the CPB for Brigham Young University ("BYU"). (R. 2182; 2263: 388.) In February 2006, prior to being forced to resign from BYU, Harold grossed approximately \$5,996.00 per month. (R. 2181-82.)

visitation, recognizing “[t]here is an issue regarding the extent and number of incidences of sexual molestation and whether [Harold] is a danger to the children.” (R. 87.) The court also ordered Harold to take a polygraph and continue certain psychosexual testing with Dr. Roby and stated that it would review the visitation issue upon request of either party after Harold completed the testing. (R. 86-87.)

In that July 2002 Order, the trial court also ordered Harold to pay \$1,797 in child support and \$230 in alimony per month, specifically finding that Valerie “reserves the right to argue retroactivity of support.” (R. 86.) The court further ordered Harold to maintain health insurance on Valerie and the minor children and to maintain the parties’ car insurance. (*Id.*) The court awarded temporary possession of the marital residence to Valerie and ordered that Valerie pay the first mortgage on the home. (*Id.*) The court awarded temporary possession the parties’ 1991 Subaru, 1990 GMC truck, and 1977 LaSalle trailer to Harold and awarded the 1993 Suburban and the 1987 Ford Van to Valerie, with the provision that both parties were restrained from “dissipating, encumbering, or hiding assets” during the divorce proceeding. (R. 85.)

The trial court ordered the appointment of a Guardian ad Litem (“GAL”) on December 26, 2002. (R. 124.) And the court entered a Case Management Order on January 21, 2003, requiring the parties to produce, as part of their initial disclosures, bank statements for all accounts, as well as credit card statements, bills, or other evidence of the parties’ debts or obligations. (R. 129-31.) The Case Management Order also provided that “[e]ach party will have unlimited interrogatories including discrete subparts.” (R. 129.). This was the only Management Order entered in the case.

***a. Harold's Contemptuous Conduct***

Throughout the course of the proceedings, Harold engaged in repeated conduct designed to delay discovery and the conclusion of the matter, which resulted in greatly increasing Valerie's attorney fees. The first instance of such conduct was raised by Valerie on September 24, 2003, in response to Harold's motion for temporary relief. (R. 160, 183.) In her Counter-Affidavit, Valerie explained that Harold refused to comply with the July 2002 Order by submitting to the polygraph and completing the psychosexual testing. (R. 183.) Valerie also stated that Harold has "intentionally stalled" the "final determination of child support, alimony, auto insurance, and medical insurance" by his refusal to complete the testing ordered by the trial court.<sup>5</sup> (R. 182.)

Over six months later, Harold had still failed to comply with the trial court's order. As a result, the GAL filed a Motion to Compel Discovery, echoing Valerie's concerns about Harold's evasive and dilatory conduct. In that motion, the GAL stated as follows:

The [GAL] has had to make extensive efforts to find out if [Harold] had in fact completed [the] polygraph testing and ... the psycho-sexual evaluation with Dr. Roby. While [Harold] did complete the psycho-sexual evaluation which the [GAL] finally obtained from Dr. Roby, [Harold] did not submit himself for the polygraph exam as previously ordered by the Court.

....

[T]he [GAL] believes the Court must address [Harold's] failure to abide by a Court order and his failure to respond to the discovery that has been sought and ordered.

(R. 210-11.)

In response, Harold admitted that he had undergone a polygraph examination but claimed that he did not "have a copy in his possession." (R. 221.) Harold also claimed

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<sup>5</sup> It appears that Harold's motion was never submitted to the court for a ruling.

that, while he had provided signed releases to the GAL to obtain the results of the polygraph, he would “be willing to re-sign any release papers to have the results of the polygraph examination released to the [GAL’s] office if the release papers have been misplaced, and if a copy of the polygraph exam can be located.” (R. 220.)

However, nearly two months after Harold’s representations, neither the GAL nor Valerie had been provided a copy of the polygraph examination. (R. 2249:19, 21.) Harold also failed and refused to provide documents requested by Valerie concerning his financial status. (R. 362; 2249:20.) Despite these repeated violations of the court’s order, however, Harold moved the court to reduce his child support and to eliminate the award of temporary alimony because of Valerie’s newly obtained job. (R. 160, 296.) Valerie responded by filing her own Order to Show Cause and Request for Order for Contempt based on Harold’s violations of the July 2002 Order. (R. 357-62.)

At the June 24, 2004 hearing on these motions, the GAL expressed her concerns about Harold’s delay and failures to comply, noting that the case had “languish[ed]” for two years. (R. 2249:18.) The GAL requested that the court require Harold to “obey the terms of the order he stipulated to and willingly agreed to” and impose “specific cut-off dates for discovery so we can be sure to have this information, so that ... this case ... isn’t prolonged any further than what it already has.” (*Id.*)

After argument, the court refused Harold’s request for affirmative relief from the award of temporary alimony based on Harold’s failure to comply with the court’s orders. (R. 379, 2249:32.) The court also reserved Harold’s claim for a credit for overpayment of child support “pending his completion of the psychosexual testing.” (R. 378.)

Nearly two months after this hearing, Valerie subpoenaed the information regarding Harold's psychosexual evaluation from ISAT and Dr. Roby, (R. 384, 391), but Harold had still failed to provide the necessary releases, resulting in ISAT's motion to quash the subpoena on the ground that "[t]here has been no waiver of the [patient-therapist] privilege by the patient himself in this case." (R. 462.) At the same time, Harold had also failed to pay his share of the children's medical and child care expenses as ordered by the court. Thus, on August 19, 2004, Valerie filed an Order to Show Cause and Motion to Compel. (R. 392-97, 400-46.) In her affidavit, Valerie emphasized the need for receiving complete responses to her discovery request, declaring that she "cannot go forward in preparation for trial without the requested items." (R. 396).

At the September 21, 2004 hearing on Valerie's motion, the court rejected Harold's excuses that he could not produce the records because they were not in his possession. (R. 2250:8.) Based upon Rule 34, Utah Rules of Civil Procedure, the court ordered Harold to provide all of the requested documents within two weeks. (R. 601; 2250:8.) The court further ordered that, if Harold did not have possession of certain documents, he was required to provide releases for those records to the GAL and Valerie within two weeks from the date of the hearing. (R. 601, 2250:8-9.) The court also awarded Valerie judgments of \$231 for unpaid medical expenses and \$7,590 for unpaid child care expenses. (R. 600-01.)

On October 8, 2004, more than two weeks after the September 21, 2004 Hearing, Valerie's counsel was forced to cancel the deposition of Dr. Roby because Harold had still not complied with the court's order to produce the records and provide the necessary

releases. (R. 521.) Accordingly, on October 12, 2004, Valerie filed a Notice to Court of Willful Refusal of [Harold] to Sign Releases. (R. 518-24.) Harold responded by filing a Notice of Compliance on October 18, 2004, (R. 554-59), misrepresenting that he had complied with the court's order "when in reality he had only signed one release and failed to produce any other documents." (R. 2164.)

At the same time that he made this misrepresentation to the court regarding his alleged compliance, Harold moved for unsupervised visitation based upon the recommendation of Dr. Roby. (R. 551-53.) Harold also moved for a stay of judgment to prevent Valerie from garnishing his wages to recover the judgment for unpaid child care expenses. (R. 630-31.)

At a December 2, 2004 hearing, Harold withdrew his request for unsupervised visitation, conceding that Dr. Roby may not have been qualified to render a visitation recommendation when he had never actually seen Harold or the children. (R. 2251:3.) Harold did argue his request to stay the garnishment, which the court denied. (R. 666.)

On March 23, 2005, over six months after he was ordered to produce all releases for the financial information and psychosexual evaluations, Harold still had not produced releases for the polygraph examination or for any of his financial institutions, forcing Valerie to again file another Order to Show Cause to seek enforcement of the court's orders. (R. 701-02.) In that motion, Valerie also sought relief from Harold's continuing failure to pay the child care expenses and car insurance premiums. (R. 701.)

The trial court heard argument on Valerie's order to show cause on April 18, 2005, during which Harold argued that he had fully complied with the court's orders. (R.

2253:10-11.) However, the trial court declared that, “reviewing the file as a whole, it is clear to the Court that [Harold] has not been forthcoming with the discovery responses as requested by [Valerie].” (R. 2253:22-23.) The court therefore found Harold “in contempt” and sentenced him to five days in jail. (R. 2253:27.) The court stayed the jail sentence “due to the county jail being near capacity and only for that reason.” (R. 819.) The court authorized Valerie’s counsel to prepare the needed releases and ordered Harold to pay the attorney fees incurred to do so. (R. 819-20.) And the court awarded Valerie the attorney fees incurred to bring the matter before the court. (R. 819.)

On April 28, 2005, Harold filed another “Notice of Compliance,” representing to the court that he had provided signed releases for the polygraph information on April 25, 2005. (R. 791.) However, unbeknownst to anyone, Harold withdrew his releases two weeks later on May 9, 2005, before the documents could be obtained. (R. 2163.)

Also in April 2005, Harold filed his own order to show cause as to why Valerie should not likewise be held in contempt for her alleged failure to comply with discovery requests. (R. 771-73.) At the hearing regarding that motion, however, Valerie explained that she had provided the information nearly two years before, that she had fully answered the discovery requests, and that she was willing to supplement or update the information, if necessary. (R. 2254:13-18.) The trial court agreed with Valerie, declaring, “I don’t find the answer in regards to those issues [child care expenses] to be insufficient on their face.” (R. 2254:19.) The trial court did order both parties to fully update the documentation provided to each other within 30 days. (R. 823.) No finding of contempt or other sanction against Valerie was ever made. (R. 822-23.)



By October 7, 2005, Valerie had still not received any documents related to Harold's polygraph examination despite subpoenaing the information and providing the signed releases from Harold, which she believed were still valid. (R. 2255:21.) The trial court, also believing the releases to be valid, ordered that the documents be disclosed and declared that, because Harold signed the releases, "the focus is going to shift to the providers as to why they haven't released it. If they want to come in and try to explain and give me some legal basis for not releasing it ... I'll hear it." (R. 2255:30-31.) While Harold renewed his claim to pursue unsupervised visitation during that hearing, he did not inform the court that he had rescinded his releases. (R. 2255:9.)

Thereafter, on October 18, 2005, Valerie served Dr. Roby and the polygraph testers with subpoenas duces tecum, requiring them to produce all information regarding any tests conducted with Harold. (R. 886-91, 892-97.) On March 14, 2006,<sup>6</sup> Dr. Roby objected to the subpoena, stating that "disclosing confidential information without proper authorization constitutes unprofessional conduct." (R. 953.) Valerie again served Dr. Roby and the polygraph testers with additional subpoenas duces tecum on March 24, 2006. (R. 986-1009.) To prevent the disclosures, Harold moved to Quash Subpoenas Duces Tecum, Reconsider Its Prior Ruling re: Lie Detector Tests and Prevent Further Depositions. (R. 1010-17.)

Harold's motion to quash was scheduled to be heard on May 15, 2006, along with

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<sup>6</sup> It appears that the reason for the delay between the date on which the subpoena was served and the date on which Dr. Roby filed his objection is due to the automatic stay that was imposed after Harold filed for bankruptcy on October 14, 2005. (*See Respondent's Notice*, R. 914 (stating that "this matter is stayed from further litigation, until the bankruptcy matter has been resolved").)

Valerie's two motions for contempt based on Harold's failure to comply with discovery requests and his failure to pay the court ordered child support and alimony. (R. 1042-43, 1054, 2256:22.) At the beginning of that hearing, Harold abruptly backtracked, stating that he wanted "to not proceed on unsupervised visitation." (R. 2256:7.) Harold then entered into a stipulation in which he permanently waived his right to any visitation other than visitation that "is supervised by a third party professional visitation supervisor such as ACAFS or WillWin." (R. 1337-38.) Harold also stipulated that Valerie made a prima facie case of contempt regarding her two motions, reserving his right to argue against the prima facie case of contempt at trial. (R. 2256:43)

On March 1, 2006, Harold filed a Verified Motion to Modify Alimony, Child Support & Child Care & for Visitation Sanctions, in which he requested that the trial court reduce his amount of child support and award him temporary alimony based on the fact that he had recently lost his job, (R. 944), even though he had already remarried.<sup>7</sup> (R. 2180.) Although Harold claimed in his motion that he should only be imputed minimum wage as "his current income," (R. 944), Harold ultimately admitted later at trial that he had actually received his normal BYU monthly salary through April 1, 2006, and received a lump-sum severance payment for earned leave of \$2,942.82. (R. 2263:413-

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<sup>7</sup> Respondent also formally moved to amend his answer, on June 5, 2006, to allege that he is entitled to alimony. (R. 1199-1201.) Although Harold's motion was granted, (R. 2259:36), Harold's replacement counsel established the unreasonableness of that request by announcing to the court in a hearing held on November 14, 2006, that he was "baffle[d]" and "amazed that [Harold's previous counsel] filed a motion to amend pleadings to allege alimony on the part of [his] client." (R. 2261:38.) Because he conceded that any "alimony order would ... be limited to a very short period of time and [Valerie] probably wasn't working and [Harold] was," Harold's counsel withdrew that issue as a trial issue. (*Id.*)

16.) Harold then began his new job with Medicity on May 3, 2006. (R. 2263:418.) Thus, at no time during the pendency of Harold's motion was Harold without income. Yet, despite this fact, Harold unilaterally reduced the amount he paid as child support to \$45.00 and unilaterally eliminated any payment for alimony. As a result, on April 14, 2006, Valerie was forced to bring another Motion for Order to Show Cause to compel Harold to comply with the court's support orders. (R. 1019-20.) Valerie also requested on May 8, 2006, that Harold be found in contempt for failing, *inter alia*, to (1) maintain health insurance, (2) pay the parties' car insurance, and (3) pay his share of the children's unpaid medical expenses. (R. 1071-72.)

Valerie's motions were heard on June 15, 2006, during which Harold stipulated that Valerie made a prima facie showing of contempt, (R. 2257:6), and the court entered judgment in favor of Valerie, reserving the issue of contempt for trial. (R. 1340-41.)

Also in April 2006, Valerie served Harold with a second set of discovery requests, seeking information related to Harold's financial status. (R. 1294-1300.) Harold refused to answer Interrogatory Nos. 8-15 on the ground that the interrogatories, including discrete subparts, exceeded 25.<sup>8</sup> (R. 1287-89.) Harold also failed to produce any of the requested documents. (R. 1287-92.) On June 15, 2006, Valerie's counsel wrote to Harold's counsel, requesting that Harold provide responses to the outstanding discovery or state the reasons he believed the requests to be unreasonable. (R. 1329.) Valerie's counsel also requested to depose Harold's new wife, Ms. Bruni. (*Id.*) When Harold

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<sup>8</sup> This is so despite the "unlimited interrogatories" provision in the Case Management Order. (R. 129.)

refused to comply with these requests, Valerie again moved the court to compel Harold to respond on July 13, 2006. (R. 1273-1316.)

As a result of Harold's delays and to ensure that she received "complete disclosure of all outstanding discovery" prior to trial, Valerie requested that the August 24, 2006 trial date be rescheduled after the discovery issues were resolved. (R. 1342-43, 1344-1440.) Valerie emphasized the need to obtain complete discovery responses in sufficient time to depose Ms. Bruni and then to adequately prepare for trial. (R. 1436-39.) Because the information sought by Valerie was "needed by her to fully and adequately present her claims at trial," Valerie requested that the court continue the trial until the issues could be resolved. (R. 1436.) The court rescheduled the trial date to November 22, 2006, (R. 1441), and set a hearing on Valerie's motion to compel for August 24, 2006.

At that hearing, the trial court questioned Harold's counsel regarding Harold's compliance. (R. 2259:61.) In response, Harold's counsel, who had moved to withdraw, essentially conceded to Harold's pattern of evading discovery and disregarding the court's orders when he declared, "Your Honor, ... this is part of the problem that I'm having and I want you to remember this as far as my motion to withdraw. I tell my client to do something, he doesn't do it and then I look bad ..." (*Id.*) The court responded by stating its perception that the case was "dragging out" because of the "recalcitrance on [Harold's] part, [and] his wife's [Brenda] part." (*Id.*)

Ultimately, the trial court found Valerie had a "reasonable basis" to seek the financial information from Harold's new wife, Brenda Bruni, because such documents concerned Ms. Bruni's ability to contribute to Harold's financial expenses and whether

Harold had been diverting funds to Ms. Bruni. (R. 2259:29.) The court ordered that Valerie could depose Ms. Bruni by a subpoena duces tecum to obtain her “bank records.” (R. 1760.) The court also ordered Harold to respond to the interrogatories to which he had objected on the ground that they exceeded 25 and ordered Harold to produce his tax records, W-2s for the years 2003 and 2005, and his cell phone records. (R. 1759.) The court ordered both parties to provide complete sets of bank account statements, revolving account statements, and updated financial statements, declaring that the documents must be provided within 30 days and that depositions must be conducted within 60 days from the date of the hearing. (R. 1758-59.) Of course, Harold did not provide the information within the 30 days. (R. 1703-04.)

During the entire litigation, Valerie was forced to spend valuable financial resources to deal with Harold’s “recalcitrance” and delay tactics, but never received the full amount of court ordered child support, child care, and unreimbursed medical expenses. (R. 1448-49.) At a hearing held on August 28, 2006, the court awarded Valerie judgment in the amount of \$3,612.00 for the unpaid child support, day care expenses, and unpaid medical insurance. (R. 1819.) The court also found Harold in contempt for failing to pay the ordered child support and alimony, and it reserved the issue of Valerie’s legal fees for trial, specifically finding that she “substantially prevailed on the issues before the Court today.” (R. 1818; 2260:31.)

Valerie noticed Brenda’s and Harold’s depositions for October 11, 2006, and October 13, 2006, respectively, (R. 1546), but was forced to cancel both depositions when Harold and Brenda continued to refuse and failed to produce the documents and

information previously requested. (R. 1704.) Harold's deposition was rescheduled for November 6, 2006, (R. 1559), but he again failed to adequately respond to the discovery requests. (R. 1704.) As of November 6, 2006, Valerie had still not received the cell phone records, the complete set of bank account statements, the monthly statements for Harold's revolving accounts, and full information on his medical, life, disability, and health insurance. (R. 1703-04.) Faced with this complete and deliberate lack of compliance despite previous findings of contempt, Valerie filed a motion on November 7, 2006, just two weeks before trial, requesting that Harold's default be entered as a sanction for his conduct. (R. 1563-64.) In that motion, Valerie detailed Harold's extensive history of contemptuous conduct by refusing to comply with her discovery requests and the court's orders. (R. 1563-1712.)

The court heard argument on Valerie's motion on November 14, 2006, just one week before trial was to begin. At that hearing, Harold appeared with new counsel and no real excuse as to why he had not fully complied with all the discovery requests. To the contrary, Harold's new counsel agreed that Valerie is "entitled" to the documents, and he represented that "we'll continue to try to get it and we'll provide it as soon as we do get it ...." (R. 2261:20.) After argument, the court found that Harold's hands "are very unclean" because of his "unvarying pattern in this case" "to duck and to evade and to avoid and to withhold." (R. 2261:43-44.) The court did not enter Harold's default, but it did order that: "If it turns out that we get to trial and [Valerie] is unable to present the necessary evidence based on [Harold's] failure to provide the necessary evidence through the discovery, I'm going to make the ruling that [Harold] will be precluded from

defending on that issue.” (R. 2261:43, 45.) The court also reinstituted Harold’s 5-day jail sentence to be served after conclusion of the trial. (R. 2261:44, 47.)

The trial began on November 22, 2006. Valerie provided substantial testimony regarding Harold’s contemptuous conduct and violations of court orders. Indeed, Valerie provided uncontested testimony that Harold had dissipated the marital estate, in direct contravention of the court’s July 2002 Order, by selling the GMC truck and trailer temporarily awarded to him, by abandoning exercise equipment owned by the parties, and by giving Ms. Bruni the parties’ entertainment center. (R. 2262:112, 113, 114; 2264:563, 571, 572-73; 2265:623.) Valerie also testified about the numerous discovery battles she had with Harold over matters essential to Harold’s quixotic claim for unsupervised visitation and his believed financial status. (R. 2262:181-99, 203-04.) Valerie also testified that, early in the proceedings, Harold’s legal counsel told Valerie that if she did not accept a settlement proposed by Harold, he would “delay and delay and delay this case until you pay out more in attorney’s fees than you’ll ever see out of my client.” (R. 2262:203.)

The trial concluded in December 2006. The court then issued a Memorandum Decision, but not until May 2007. (R. 2027-87.) Despite finding Harold in contempt for violation of several interim court orders, including failing to maintain health insurance and pay insurance premiums, failing to maintain car insurance, failing to pay medical expenses, disposing of marital assets, failing to pay child care expenses, failing to pay alimony, unilaterally reducing child support, failing to pay child support, and failing to comply with discovery requests, (R. 2156-57, 2160-67, 2173, 2174, 2186, 2189, 2192,

2193, 2195, 2196, 2198), the trial court then only awarded Valerie \$12,502 in her attorney fees for the divorce case, which was less than 15% of her total attorney fees incurred. In so doing, the trial court reasoned that the attorney fees incurred were truly “beyond reason for a marital estate of this size.” (R. 2157.)

### **SUMMARY OF ARGUMENT**

As discussed more fully below, the trial court erred in (1) refusing to award Valerie alimony, (2) awarding Valerie less than 15% of her attorney fees incurred in the divorce and bankruptcy proceedings, (3) finding Valerie’s request for nanny care was unreasonable, (4) refusing to award Valerie any portion of the payments she made to the parties’ home mortgage after the parties separated, and (5) finding that Valerie did not raise and reserve her right to argue for retroactive support. Accordingly, Valerie requests that this Court reverse the trial court on those issues and hold that, due to the court’s failure to enforce sanctions against Harold for his continuous and willful refusals to provide discoverable documents, Valerie was prejudiced in her ability to present her case such that she is entitled to a new trial to determine the parties’ income, assets, and debts.

First, the trial court abused its discretion in denying Valerie’s request for alimony because it failed to properly consider each of the *Jones* factors required in an alimony determination and, more specifically, failed to determine Harold’s ability to pay. Additionally, the court erred in refusing to impute as income to Harold his Novell salary when the undisputed evidence established that Harold had the ability to earn such an income. Finally, the trial court abused its discretion in failing to enforce sanctions against Harold despite the fact that Harold’s conduct prejudiced Valerie and deprived her



of her right to a fair trial.

Second, the trial court erred in finding that the amount of attorney fees incurred by Valerie was unreasonable given the undisputed evidence that Harold's contemptuous and willful misconduct resulted in delays in the proceedings and caused Valerie's fees to increase "substantially."

Third, the trial court erred in finding that Valerie's request for nanny care was unreasonable when the clear weight of the evidence demonstrated that nanny care was the only available option to Valerie given that her job demands that she be away from home on business trips from three to six days each month.

Fourth, the trial court erred in denying Valerie any portion of the \$64,000 she paid to the parties' home mortgage after their separation because Valerie is entitled to be reimbursed for the contribution that she made to the home's equity.

Finally, the trial court erred in finding that Valerie did not raise and reserve her right to argue retroactive support when the evidence clearly establishes that she requested retroactive support in her Complaint and the trial court reserved that issue for trial.

## **ARGUMENT**

### **1. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING ALIMONY**

Although a trial court has broad discretion in determining alimony, it "must exercise its discretion in accordance with the standard(s) that have been set by this Court." *Jones v. Jones*, 700 P.2d 1072, 1074 (Utah 1985). Those standards mandate that the trial court "consider 'at least the following factors in determining alimony: (i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity

or ability to produce income; (iii) the ability of the payor spouse to provide support; and (iv) the length of the marriage.” *Williamson v. Williamson*, 1999 UT App 219, ¶ 8, 983 P.2d 1103 (quoting Utah Code Ann. § 30-3-5(7)(a) (1998)).<sup>9</sup> The failure to properly consider each of these factors, often referred to as the *Jones* factors, is an abuse of discretion. *Willey v. Willey*, 866 P.2d 547, 550 (Utah Ct. App. 1993). Also, even if the trial court has considered each of the *Jones* factors, its alimony award may still be reversed if it is shown “that such a serious inequity has resulted as to manifest a clear abuse of discretion.” *Bakanowski v. Bakanowski*, 2003 UT App 357, ¶ 10, 80 P.3d 153 (internal quotations omitted).

As discussed more fully below, the trial court’s ruling that Valerie could not recover alimony is erroneous in at least three respects. First, the trial court abused its discretion by failing to consider each of the required *Jones* factors. Second, the trial court’s failure to preclude Harold from defending against Valerie’s claim that Harold’s new wife either shared, or was able to share, his living expenses resulted in a serious inequity manifesting an abuse of discretion. Third, the trial court erred when it refused to impute income to Harold in the amount that he had earned during the marriage.

**a. The Trial Court Failed to Consider Each of the *Jones* Factors**

To properly consider each of the *Jones* factors, this Court has held that the trial court must “move beyond merely considering [the parties’] incomes and inquire more fully into their financial situations, including [a party’s] new spouse’s financial ability to

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<sup>9</sup> Section 30-3-5 has subsequently been amended to require the consideration of additional factors. See Utah Code Ann. § 30-3-5(7)(a) (2002).

share living expenses with him [or her].” *Williamson*, 1999 UT App 219 at ¶ 11 (internal quotations omitted). Such an “in-depth consideration of the parties’ circumstances is necessary to fulfill the goal of alimony, which is to equalize the parties’ standards of living, not just their incomes, in those cases in which insufficient resources exist to satisfy both parties’ legitimate needs.” *Id.* A trial court abuses its discretion if it fails to conduct such a consideration into the parties’ circumstances and instead attempts to “simply equalize [the parties’] income.” *Bakanowski*, 2003 UT App 357 at ¶ 12.

In this case, the trial court analyzed only the first two *Jones* factors, finding that Valerie’s monthly expenses, excluding her monthly donation to the LDS Church and her attorney fees, exceeded her income by \$2,548.75 per month. (R. 2184; 2262:141.) The trial court did not, however, conduct a similar analysis of Harold’s ability to pay. Indeed, although the court found that Harold had the ability to earn \$5,996.00 gross per month,<sup>10</sup> (R. 2180), the court did not review or consider Harold’s living expenses, other than to declare that the \$2,252.00 he claimed he paid to his new wife for her mortgage and living expenses was not “unreasonable.” (R. 2179.) The court made no other analysis or finding concerning any additional monthly expenses that Harold may have had.<sup>11</sup> (*Id.*)

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<sup>10</sup> As discussed *infra*, the trial court erred in refusing to impute a higher monthly income of \$95,000 per year to Harold based on his demonstrated ability to earn that salary during the marriage before he unilaterally quit his Novell job.

<sup>11</sup> The only reference the trial court made to any additional monthly expenses that Harold may have had was when it declared, “[w]ere this court to award [Valerie] the monthly alimony of \$3,259.00 she seeks, plus the monthly average child-care cost of \$380.00 awarded to her by the court (for a total of \$3,639.00), [Harold], according to his financial declaration, would have \$73.46 left of his net income to pay child support and the rest of his monthly expenses.” (R. 2176.) However, the trial court never made any finding

Given that Valerie presented evidence at trial to show that Harold's claimed monthly expenses were inflated, increasing over \$1,700.00 per month in just the one year prior to trial, (R. 2264:548), the record is not uncontroverted such as to allow the *Jones* factors to be applied as a matter of law by this Court. Therefore, "[w]ithout a finding on reasonable expenses, [this Court is] unable ... to determine [Harold's] actual ability to pay and, therefore, to balance [Valerie's] needs against [Harold's] ability to pay as required in *Jones*." *Bell v. Bell*, 810 P.2d 489, 493 (Utah Ct. App. 1991); *see also Baker v. Baker*, 866 P.2d 540, 547 (Utah Ct. App. 1993) ("[S]imply stating such earnings does not amount to an adequate finding of fact as to his ability to provide support. To be sufficient, the findings should also address his needs and expenditures, such as housing, payment of debts, and other living expenses.")

Rather than considering Harold's ability to pay, the trial court based its refusal to award alimony on the parties' relatively equal incomes. Indeed, despite finding that Valerie had a monthly deficit of over \$2,500.00, (R. 2184), the trial court refused to award her any alimony after she obtained her "new well-paying job," (R. 2176), because Valerie made about \$675 per month more than Harold. (R. 2177.) But merely stating and comparing the parties' respective incomes is insufficient to satisfy this Court's mandate that the court conduct an in-depth consideration of the parties' circumstances. *See Williamson*, 1999 UT App 219 at ¶ 11. The trial court's analysis should have focused on equalizing the parties' standards of living, not their incomes. *Id.* Because the

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regarding the amount of Harold's reasonable monthly expenses which would have allowed it or this Court to determine Harold's ability to pay alimony.

trial court failed to do so, this Court should reverse the trial court's ruling on alimony, including its ruling that Harold was entitled to a credit for past alimony paid, and remand for a proper in-depth consideration of the parties' circumstances.

**b. The Trial Court Abused Its Discretion in Failing to Impute Additional Income to Harold**

Additionally, this Court should also hold that the trial court abused its discretion in failing to impute additional income to Harold after finding that he was voluntarily underemployed. “[W]hen determining an alimony award, it is appropriate and necessary for a trial court to consider all sources of income that were used by the parties during their marriage to meet their self-defined needs, from whatever source—overtime, second job, self-employment, etc., as well as unearned income.” *Griffith v. Griffith*, 959 P.2d 1015, 1017-18 (Utah Ct. App. 1998), *aff'd by Griffith v. Griffith*, 1999 UT 78, 985 P.2d 255. Although trial courts have broad discretion in assessing a spouse's income, *Griffith*, 1999 UT 78 at ¶ 19, the “critical question” in determining if income should be imputed to a party is “whether [the party's] drop in earnings was voluntary” and made as a result of “personal preference” rather than resulting from “events beyond his control.” *Hall v. Hall*, 858 P.2d 1018, 1025-26 (Utah Ct. App. 1993).

In this case, the trial court found that Harold was underemployed for purposes of child support and alimony calculations. (R. 2180.) Nevertheless, the court refused to impute to Harold the income that he was earning at Novell just five months prior to the parties' final separation and instead imputed the lower salary Harold received from BYU just prior to his forced resignation. (R. 2180-83.) In so doing, the court declared that it

“finds credible [Harold’s] testimony that he *voluntarily* left his employment at Novell for a lower paying job, because he was afraid he would be laid off before finding another job.” (R. 2183 (emphasis added).)

Clearly, this finding answers the critical question by establishing that Harold’s decision to leave his much higher paying job at Novell was indeed voluntary. Yet, despite finding that Harold voluntarily quit, the court refused to impute the Novell income to Harold, reasoning that this “change of employment occurred before the parties’ separation and the filing of this divorce.” (R. 2183.)

In so stating, however, the trial court failed to consider its own findings that “[i]n 2001[,] the parties separated several times from the beginning of May through the summer” and that the parties’ final separation occurred in October 2001. (R. 2216.) As the goal of imputing income is to “prevent parents from reducing their child support or alimony by purposeful unemployment or underemployment,” *Griffith*, 959 P.2d at 1018, the trial court abused its discretion in failing to consider the fact that Harold made the decision to resign from Novell and accept a lower paying job, a decision to which Valerie objected, amidst the parties’ multiple separations and just four months prior to the parties’ final separation. *See Hill v. Hill*, 869 P.2d 963, 964, 966 (Utah Ct. App. 1994) (holding the “court, in making the alimony award,’ was not bound by Mr. Hill’s decision” to quit his job at the time the parties separated). As Harold’s decision to resign from Novell was entirely voluntarily and it is undisputed that he has the ability to earn that level of income, this Court should hold that the trial court’s refusal to impute the Novell income to Harold was an abuse of discretion.

**c. The Trial Court's Ruling Resulted in Serious Inequity**

Finally, given the trial court's ruling that expressly held that Harold would not be able to defend on any issues on which Valerie could not sufficiently present evidence due to his evasiveness, the trial court's alimony determination, which was based, in part, on its finding that Harold's new spouse could not contribute to his living expenses, is unduly prejudicial and should be reversed. About three months prior to the trial in this case, the trial court ruled that Valerie was entitled to take the deposition of Ms. Bruni regarding her financial status, finding that such information was relevant to Ms. Bruni's "ability to contribute to financial expenses" and Valerie's ability to show whether Harold diverted funds to Ms. Bruni. (R. 2259:29.)

However, as outlined in Valerie's Motion for Default Judgment, Valerie was forced to cancel the scheduled depositions of Ms. Bruni and Harold because they "failed to produce the discovery as ordered by the Court." (R. 1704.) Indeed, Ms. Bruni admitted at trial that she did not produce any bank records received prior to marrying Harold, erroneously claiming that she was only ordered to produce the bank records received after she married Harold. (R. 1760, 2264:510-11.) Based on this and several other discovery violations, Valerie moved for Default Judgment, which was heard just one week prior to the first day of trial. At the hearing, the trial court recognized that, "[o]bviously, there's not going to be time for the depositions." (R. 2261:48.) But, finding that Harold had engaged in a consistent and repeated pattern of evading discovery, the court ordered that, "[i]f it turns out that we get to trial and [Valerie] is unable to present the necessary evidence based on [Harold's] failure to provide the

necessary evidence through the discovery, I'm going to make the ruling that [Harold] will be precluded from defending on that issue." (R. 2261:45.)

At trial, Valerie attempted to present evidence that Ms. Bruni had an ability to contribute to Harold's living expenses. (*See, e.g.*, R. 2264:481-89.) However, Ms. Bruni testified that she was unable to work due to medical reasons. (R.2264:482-83.) Had Ms. Bruni produced her bank statements received prior to her marriage with Harold, Valerie would have been able to establish that such testimony was indeed false. But because Ms. Bruni failed to produce those records, Valerie was limited in her ability to challenge Ms. Bruni's claim. (R. 2264:491-93.) The only evidence that Valerie could produce to challenge this claim and to show that Ms. Bruni was able to and, in fact, did work during the year she married Harold was a bank statement from 2006 which showed that Ms. Bruni received a tax refund in the amount of \$3,165.<sup>12</sup> (R. 2264:515.) When confronted with this evidence, Ms. Bruni stated that the refund was a "child credit." (*Id.*) She later changed her testimony, however, when called by Harold, stating that she had actually worked for nearly six months in 2005 at a periodontist's office, during the same time that she had been dating Harold. (R. 2264:478; 2265:638-39.)

Despite this incredible and contradictory testimony from Ms. Bruni, the court accepted her claim that she could not work and refused to consider her ability to share living expenses with Harold. (R. 2178-79.) Because Ms. Bruni's income is relevant to

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<sup>12</sup> Valerie also intended to present testimony from a former co-worker of Ms. Bruni's to rebut Ms. Bruni's claim that she could not work. However, Valerie ultimately did not call the co-worker after being informed by the court that the co-worker lived two doors down from the judge. (R. 2264:494.)



determining Harold's ability to pay alimony, *see Williamson*, 1999 UT App 219 at ¶ 11, and Valerie was unable to present additional evidence to disprove Ms. Bruni's claim that she is unemployable due to Harold's and Ms. Bruni's failure to produce the requested documents, the court should have enforced its November 14, 2006 Ruling and held that Harold was precluded from defending on the issue. Its failure to do so, after recognizing Harold's extensive pattern of evading Valerie's discovery in this case, results in a serious inequity that manifests a clear abuse of discretion. Thus, the court's ruling on alimony should be reversed, and Valerie should be granted a new trial to present evidence regarding each of the statutory factors to be considered when awarding alimony<sup>13</sup> after she has been allowed an opportunity to obtain and present the evidence necessary to support her claim.

**2. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING VALERIE ONLY A SMALL PORTION OF HER ATTORNEY FEES**

Because the trial court found that Harold's contemptuous conduct resulted in a "substantial" increase in Valerie's attorney fees, it abused its discretion in awarding Valerie only a small portion of those fees. Section 30-3-3(1) provides that attorney fees may be awarded to establish an order "to enable the other party to prosecute or defend the action." Utah Code Ann. § 30-3-3(1) (2002). Also, section 30-3-3(2) provides for an award of attorney fees "[i]n any action to enforce an order of custody, parent-time, child support, alimony, or division of property ... upon determining that the party substantially prevailed upon the claim or defense." *Id.* § 30-3-3(2) (2002).

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<sup>13</sup> The award should include retroactive alimony as requested in the Complaint (R. 3.)

Generally, when awarding attorney fees under section 30-3-3(1), *i.e.*, in a proceeding to *establish* an order of custody, parent-time, child support, or alimony, the award “must be supported by evidence that the amount awarded was reasonable and that the party receiving the award was reasonably in need.” *Porco v. Porco*, 752 P.2d 365, 368 (Utah Ct. App. 1988).

However, when attorney fees are “incurred by one party seeking to *enforce* a court order, a court may disregard the financial need of the moving party.” *Finlayson v. Finlayson*, 874 P.2d 843, 850 (Utah Ct. App. 1994) (emphasis added). Thus, attorney fees are awardable pursuant to section 30-3-3(2) without regard to the needs or abilities of the parties involved. *See also* Utah Code Ann. 78B-6-311 (2009) (authorizing an award of attorney fees as damages for contempt).

As discussed more fully below, the trial court erred in refusing to award Valerie attorney fees pursuant to section 30-3-3 based on its erroneous findings that she did not substantially prevail, she did not have a financial need justifying the award, and the fees incurred were unreasonable. (R. 2157-58.) Additionally, the court abused its discretion in awarding Valerie less than 15% of the total fees incurred after finding she was entitled to attorney fees as a result of Harold’s contemptuous conduct.

**a. The Trial Court Erred in Finding that Valerie Was Not Entitled to Recover Attorney Fees under Section 30-3-3**

In refusing to award Valerie attorney fees under section 30-3-3, the court found that she “was not substantially successful on the issues she presented to the court, that the total bill for attorney’s fees and costs of \$83,349.61 was not reasonable, and that she

makes more money than [Harold] and will be receiving financial help from him on a monthly basis.”<sup>14</sup> (R. 2155-56.)

With respect to the first of these findings, this Brief demonstrates that the trial court erroneously denied several of Valerie’s proper requests. When such errors are considered, it is clear Valerie substantially prevailed upon a majority of her claims.<sup>15</sup> Additionally, with respect to the last of these findings, *i.e.*, Valerie’s financial need, the trial court expressly found that Valerie’s monthly expenses exceeded her monthly income by more than \$2,500.00. (R. 2184.) Thus, any finding to the contrary that Valerie did not have a financial need is erroneous. *See Malstrom v. Consolidated Theatres*, 290 P.2d 689, 690-91 (Utah 1955) (noting that, “if, on the same evidence, the trial court should make findings of fact necessarily contrary to each other, such action would be capricious and that such inconsistent findings should not be permitted to stand.”).

Finally, with respect to the trial court’s finding that Valerie’s attorney fees were not reasonable, that finding is against the clear weight of the evidence and should be reversed. In finding the fees unreasonable, the trial court reasoned as follows:

The court finds that the fees incurred by [Valerie] are not reasonable, but are truly beyond reason for a marital estate of this size. The court is appalled at the effort that went into minor areas, such as the \$180.00 in used gym equipment and the used \$75.00 entertainment center. Some of [Valerie’s] requests were absurd, such as the amount requested for alimony and reimbursement for all of the house payments. [Harold] should not have

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<sup>14</sup> It should be noted that Valerie paid an additional \$12,000.00 for legal representation prior to engaging Mr. Thayer. (R. 2262:208-09.) However, the trial court’s award only considered Mr. Thayer’s legal fees.

<sup>15</sup> It should also be noted that the finding that a party “substantially prevail” is not an element required to grant Valerie attorney fees under section 30-3-3(1) for *establishing* an order, which is what the trial, in fact, accomplished.

to pay for attorney's fees incurred in pursuing such unreasonable requests.

(R. 2157.)

At trial, the following evidence was presented in support of the trial court's finding that Valerie incurred fees related to "minor areas": Valerie testified that Harold dissipated six pieces of home gym equipment by abandoning the equipment in Montana and that Harold dissipated an entertainment center by giving it to his new wife, (R. 2262:113-14), on cross examination, Valerie described the entertainment center, (R. 2262:255), Ms. Drake, Valerie's bankruptcy attorney, testified that Harold did not list several personal property items, including the entertainment center and the gym equipment, on his original schedules filed with the bankruptcy court, (R. 2264:445-46), Ms. Bruni testified that Harold gave her several items when they married, including the entertainment center, (R. 2264:500), Harold testified in the bankruptcy court that he took the gym equipment to Montana to be held until he had a place to move into but that he had no financial way to retrieve it and bring it down to Utah, (R. 2264:564-66; 2265:619-20), Harold testified that his sister "[j]unked" the equipment, (R. 2264:571), Harold testified that the only marital property item given to Ms. Bruni was the entertainment center, (R. 2264:572-73), Harold testified that he originally took the gym equipment to Montana in a U-haul trailer and that his subsequent trips to Montana were by motorcycle, (R. 2265:645), Harold testified that he purchased the gym equipment used from the Alpine School District for \$20.00 per item, that he bought four or five pieces of equipment, some of which were broken at the time of purchase, and that Valerie gave them to him and told him to get rid of them, (R. 2265:645-47), Harold testified that the

entertainment center was made of particle board, had crayon and marker marks on it, and was worth approximately \$150, (R. 2265:666-67), and Valerie testified that she did not tell Harold to take the equipment, but that Harold took the equipment and several other items when he requested to go through the house, (R. 2265:735.)

Although it is true that Valerie raised the issue of Harold's dissipation of the entertainment center and the gym equipment, it must be recognized that she did so in the overall context of establishing Harold's multiple and continuous violations of the court's orders. Indeed, the evidence presented by Valerie regarding the entertainment center and the gym equipment was only a portion of the long line of evidence presented to establish Harold's pattern of flagrantly and willfully violating the trial court's orders. (*See, e.g.*, R. 2262:112-13, 115-18, 144-45, 150-51, 180-204.) For example, Valerie first testified that Harold sold the parties' GMC truck and the parties' 30' LaSalle trailer in contravention of the trial court's order that Harold not dissipate the parties' marital property. (R. 2262:112-13.) When asked whether there was any other property that Harold dissipated in violation of the order, Valerie responded by describing the entertainment center and the exercise equipment. (R. 2262:113-14.) Valerie also testified about Harold's repeated violations of other court orders, including orders regarding child support and child care and orders regarding document production. (R. 144-45, 150-51, 180-204.)

In addition to referring to the gym equipment as evidence of Harold's contempt of court, Valerie also used that evidence to challenge Harold's credibility, noting that he testified in the bankruptcy court that he had no "financial way of getting back up to Montana," (R. 2264:565), but then establishing that he took over seven trips to Montana

during the years 2004 and 2005, alone. (R. 2264:568.) As a large part of this case rested on the parties' credibility, especially given the fact that Harold failed to produce all of the documents related to his and his wife's current financial status, Valerie was more than justified in presenting evidence that Harold had provided false testimony in either the bankruptcy proceeding or the divorce proceeding.

Overall, the trial transcripts span more than 740 pages, yet only a total of 21 of those pages even mention the exercise equipment or the entertainment center. Of that, only 13 pages contain references to the equipment elicited from Valerie's counsel. Clearly, Valerie's very limited references to the gym equipment and entertainment center, which served as evidence of Harold's willful violations of the court's orders and as evidence of Harold's inconsistent testimony, were not frivolous or unreasonable.<sup>16</sup>

Finally, it should be noted that, in finding the attorney fees unreasonable, the court compared the amount of the fees incurred to the value of the marital estate. But such a comparison is improper in this case in light of the fact that one of the major issues to be litigated by the parties was whether Harold should be awarded unsupervised visitation. Because Harold repeatedly evaded and ignored Valerie's requests for documents related to his psychosexual evaluations, Valerie was forced to pursue all of the legal remedies available to her to compel Harold to produce the documents so that she could ensure that he would not be a danger to her children. Just six months before the trial, and after nearly

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<sup>16</sup> With respect to the trial court's finding regarding Valerie's requests for alimony and reimbursement of mortgage payments, Sections 1 and 4 of this Brief show that these requests were also not unreasonable or "absurd" but are in fact warranted by law and equity.

four years of ongoing discovery battles related to the production of that information, Valerie was ultimately awarded full custody and Harold permanently waived his right to unsupervised visitation. But that victory of ensuring her children's safety can never be translated into a dollar figure. Thus, the trial court erred when it failed to consider the complex issues in the case, including the substantial violations of contempt, and instead merely compared the amount of attorney fees incurred with the value of the marital estate to determine the reasonableness of the fees.

**b. The Trial Court Abused Its Discretion in Awarding Valerie Less Than 15% of Her Attorney Fees Based on Harold's Misconduct**

As outlined above, this case is not a typical divorce case. From the beginning, one of the primary issues to be resolved was whether Harold should be awarded unsupervised visitation. (R. 2255:9 (statement by Harold's counsel that unsupervised visitation is "a big issue").) Because of issues of abuse, Harold was initially ordered to submit to certain psychosexual testing. (R. 87.) Throughout the next four years, Harold engaged in a series of tactics designed to avoid producing his test results and/or related documents, including reversing his stance on unsupervised visitation several times and even going so far as representing to the court that he had signed the required releases even though he had, in fact, rescinded the releases. (R. 2163; 2262:180-89.) As a result of Harold's conduct, both Valerie and the GAL filed motions to compel. (R. 210-11; 357-62, 392-99, 701-02, 1071-72.) Valerie also incurred costs in scheduling depositions for Harold's providers only to be later served with objections and motions to quash due to the fact that Harold had not authorized the documents to be released. (R. 464, 953.) While Harold

finally agreed to permanently waive his right to unsupervised visitation in May 2006, he represented to Valerie up until that time that he intended to pursue unsupervised visitation. (R. 551-53; 2255:9.) Thus, she had no choice but to bring the motions before the court to ensure the safety of her children.

Valerie was also compelled to seek court intervention to address Harold's intentional failures to pay court ordered child support, child care expenses, alimony, medical expenses, and premiums for health and car insurance. Because Valerie was taking care of six minor children and her monthly expenses far exceeded her income, she was dependent upon the support that Harold was ordered to provide in order to sustain her family. Yet, on five separate occasions, Harold violated the court's orders and unilaterally changed his obligations to Valerie and his children based on his own preferences and interpretations of law, including reducing his child support payments to only \$45.00 per month. (R. 1019-20.) Valerie was thus compelled to return to court five times to obtain relief. (R. 357-62, 400-446, 701-02, 1019-20, 1448-49.)

In addition to that conduct, Harold also refused to answer Valerie's discovery requests that sought information regarding his financial status. As such information was necessary to present her case at trial, the only option available to Valerie to obtain the documents was to seek court intervention. Valerie brought a total of three motions to compel, requesting that the court compel Harold to produce the financial documents relevant to the case. (R. 357-62, 391-97, 1273-1316.) Harold's evasiveness also caused Valerie to request a continuance of trial, which was granted. (R. 1342-43.) But while the court continually ordered Harold to comply with the discovery requests, he still



refused to turn over the requested documents and information. In fact, just two weeks before the trial was set to begin, Valerie had still not received the documents she requested from Harold and his new wife, nor was she able to depose Harold or his new wife regarding information which the court deemed relevant to the case due to their failure to produce the requested information. Therefore, Valerie moved for default judgment as a sanction for Harold's willful misconduct. (R. 1563-1712.)

In total, Valerie was forced to seek court intervention on nine separate occasions to address Harold's various violations of court orders and refusals to comply with discovery requests.<sup>17</sup> These requests were never found to be without merit or frivolous. To the contrary, just one week before trial, the trial court found that "much of what has been said on behalf of [Valerie] is well taken and well-deserved." (R. 2261:44.) In fact, the court found that Harold's contemptuous conduct rose to such a level that a jail sentence was appropriate. Additionally, recognizing the prejudice that may result to Valerie due to Harold's conduct, the trial court also ordered that Harold would be precluded from presenting any defense to an issue on which Valerie could not present sufficient evidence due to his obstructive behavior. (R. 2261:44-45.) Clearly, these rulings establish that Valerie acted appropriately in seeking the court's intervention. Indeed, this was confirmed in the trial court's Amended Decree of Divorce, which awarded Valerie the attorney fees incurred in obtaining nine separate findings of contempt. (R. 2156-57, 2160-67, 2173, 2174, 2186, 2189, 2192, 2193, 2195, 2196,

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<sup>17</sup> It should also be noted that Valerie participated in the hearing held on the GAL's Motion to Compel, echoing the GAL's concerns regarding Harold's conduct.

2198.) Yet, instead of allowing Valerie to submit an affidavit of attorney fees to establish the amount of fees incurred in pursuing and obtaining multiple judgments against Harold for unpaid child support, alimony, child care, medical care, and insurance,<sup>18</sup> the court arbitrarily limited the award to only 15% of the fees charged by Mr. Thayer.

As Harold's violations of court orders, misconduct, and "intentional efforts to thwart" discovery over a period of 4 ½ years are well documented and, in fact, resulted in several findings of contempt, it is a manifest injustice and inequity to award Valerie only 15% of the fees charged by Mr. Thayer and her bankruptcy counsel to compensate her for such conduct. Thus, this Court should hold that the trial court abused its discretion and remand for reconsideration. This Court should also award Valerie her attorney fees incurred in bringing this appeal. *See Bell*, 810 P.2d at 494 ("[W]hen fees in a divorce were awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal.").

### **3. THE TRIAL COURT ERRED IN FINDING THAT VALERIE'S REQUEST FOR WORK-RELATED CHILD CARE WAS UNREASONABLE**

The trial court's finding that Valerie did not present any "reasonable suggested costs for child-care expenses" is against the clear weight of the evidence because that evidence establishes that Valerie's request for work-related child care was the only

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<sup>18</sup> Pursuant to Rule 37 of the Utah Rules of Civil Procedure, Valerie is entitled to recover the attorney fees incurred in bringing each of her motions. *See Utah R. Civ. P. 37(a)(4)(A)* (providing that, "[i]f the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court *shall*, after opportunity for hearing, require the party ... whose conduct necessitated the motion ... to pay to the moving party the reasonable expenses incurred..., including attorney fees ...." (emphasis added).)

reasonable option available to her given her work demands. At trial, the following evidence was presented in support of the trial court's finding that Valerie's request for a live-in nanny to provide work-related child care was unreasonable: Valerie paid for nanny-care during the years 2003-2006, (R. 2262:126), for a majority of that time, the nanny paid by Valerie was her mother, (R. 2262:127), Valerie paid on a weekly basis and did not break down the wages paid to determine an hourly rate, (*id.*), Valerie paid the nannies \$400.00 gross per week, (R. 2262:129), when working as a nanny, Valerie's mother also helped clean and run errands for her, (R. 2262:259), three of the children at home were 11 years old or older at the time of trial, (R. 2262:259), Valerie did not take business trips during the months of July, August, and September, (R. 2262:268-69), and Harold testified he believed the two older children could take care of the younger children, (R. 2265:676).

However, despite this evidence, the record demonstrates that the trial court's finding of unreasonableness was so lacking in support as to be against the clear weight of the evidence. For example, Valerie testified that, prior to obtaining full-time employment after her separation from Harold, she was a stay-at-home mom for her seven children. (R. 2216; 2262:124.) Valerie also testified that her job is not a regular "9 to 5" job; rather, she goes to work at 7:20 each morning, and she leaves work anytime from 5:20 p.m. to 11:00 p.m., depending on her work load and schedule. (R. 2262:125.) Valerie testified that her job requires her to travel often for client relations and trade shows and that she cannot refuse to travel. (R. 2262:126, 297.) Valerie travels at least once a month for an average of three to six business days each trip. (R. 2262:125, 269.) While Valerie

has advance notice of the trips for trade shows, the business trips to individual clients are unpredictable and are based upon the needs of the particular client involved. (R. 2262:297.) For the year 2006, Valerie took seven business trips during the first six months of the year. (R. 2262:269.) Valerie also took a four day business trip in October. (R. 2262:268.) Valerie also had two additional trips planned for the summer of 2006, including a trip to England, but was forced to have someone else in her department fill in for her due to the hearings scheduled in the divorce and the bankruptcy cases. (R. 2262:296-97.) While her boss filled in for her on those occasions, Valerie testified that having her boss take her business trips caused difficulty at work because those trips were Valerie's responsibility, and her boss was busy with other matters. (R. 2262:297.)

Because of the travel requirements of her job, Valerie found it difficult to find responsible individuals to care for her children during her absence. Indeed, Valerie testified that "[v]ery few people want to leave their own family to come and take care of [her] children for three to five days." (R. 2262:127-28.) Consequently, when Valerie did not have a nanny working for her, she had to rely on family members "or young teenage girls who [were] available, which doesn't necessarily represent the best child care." (R. 2262:128.) This was especially so when several of Valerie's children were on medications and Valerie needed an individual "responsible enough to make sure they take their medication at the appropriate times." (R. 2262:129.)

As a result of her demanding work schedule and the realities of trying to obtain a temporary babysitter to watch her children three to six days each month, including overnight, Valerie determined that hiring a nanny, at the rate of \$400.00 per week, which

was the undisputed going rate for nannies, (R. 2262:259), was the only reasonable option available to her. The nanny's duties included all child care related activities, including making the children breakfast and lunch, taking the children to and from school at the appropriate times, taking the children to their activities and doctors' appointments, helping the children with their homework, staying with the children until Valerie returned home from work, and providing overnight care to the children when Valerie was away on business trips. (R.2262:126, 258-59.)

While Valerie's mother, who worked as a live-in nanny for a majority of the time from 2003 to 2005, also helped her daughter by cleaning and running errands, Valerie testified that such activities were not part of the nanny's responsibilities and that none of the nannies employed by Valerie, with the exception of her mother, ever performed cleaning services or ran errands. (R. 2262:258-59, 298.) Once Valerie returned home, either from work or from her business trips, the nanny was off-duty and was free to do as she pleased. (R. 2262:298.) The undisputed evidence established that Valerie paid \$60,158.91 in child care expenses for the years 2003 to 2006. (Pl.'s Ex. 16.)

Although the trial court found that "[t]he older children certainly can be expected to help with the younger children," noting that the children were aged 16, 13, 12, 9, and 7 years old at the time the court issued its decision, (R. 2187), the testimony presented at trial showed that, in 2003, when Valerie was forced to obtain full-time employment to support her children, those children were aged 12 and younger, with two of the children under school age. (R.2216; 2262:259.) Additionally, even at the time of trial, no child over the age of 18 resided in the home. (R. 2262:257.) Rather, the oldest child in the

home was only 15 years old. (*Id.*) While Valerie recognized that her 15 year old son could technically help with his four younger siblings, all aged 12 or under, Valerie testified that “he’s not as patient with them as I would like for him to be.” (R. 2262:260.) Additionally, that son participated in his school’s football program, which required that he practice from 2:30 to 5:30 each afternoon; therefore, he would be required to quit football in order to watch his siblings. (*Id.*) Finally, this Court may take judicial notice that, at 15, the son could not legally drive without an adult present. *See* Utah R. Evid. 201. Therefore, he would be unable to pick up his younger siblings from school, and he would be unable to drive the children anywhere in the event of an emergency. Clearly, forcing a 15 year old child to drop out of his school’s extracurricular activities in order to watch four children aged 12 and under simply so that his father will be able to save the expenses related to child care is not a reasonable alternative.

The evidence presented at trial unmistakably establishes that typical child care arrangements did not meet the needs of Valerie and her children. Indeed, because Valerie’s job requires that she take monthly business trips lasting three to six days each, many times without advance notice, it was necessary that Valerie had someone available to spend the nights with her children while she was away. The record demonstrates that typical babysitters were, not surprisingly, unwilling to spend a week away from their own family to provide such care. Because the clear weight of the evidence shows that the only reasonable option available to Valerie was to hire a nanny who would be responsible for caring for the children whenever Valerie was away from the home, the trial court’s finding that nanny care was unreasonable is erroneous. Therefore, this Court should

reverse and remand with the instruction that Valerie be awarded one-half of the over \$60,000.00 in child care expenses during the years 2003 to 2006, less any judgments previously awarded, with such judgment to be classified as family support.

**4. THE TRIAL COURT ERRED IN REFUSING TO REIMBURSE VALERIE ANY PORTION OF THE PAYMENTS PAID TO THE PARTIES' HOME MORTGAGE**

The trial court erred in denying Valerie's request for reimbursement of payments she made to the parties' home mortgage, after the parties separated and Harold refused to pay any portion of the same, because such a ruling constitutes a misunderstanding or misapplication of the law resulting in a substantial and prejudicial error. "In dividing a marital estate, the trial court is empowered to enter equitable orders concerning property distribution." *Jensen v. Jensen*, 2008 UT App 392, ¶ 25, 197 P.3d 117 (internal quotations omitted). Indeed, although the general rule states that each party "is entitled to fifty percent of the marital property," *Thomas v. Thomas*, 1999 UT App 239, ¶ 23, 987 P.2d 603, a trial court has the ability to allocate marital property "unequally where circumstances justify departure from the presumptive rule of equal distribution." *Id.* at ¶ 22 (internal quotations omitted).

Also, when determining the value of the marital property, trial courts generally determine such value at the "time of the divorce decree or trial." *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991). The reason for doing so is that, "[b]y the very nature of a property division, the marital estate is evaluated according to what property exists at the time the marriage is terminated." *Id.* (alteration in original) (internal quotations omitted). Nevertheless, despite this general rule, trial courts can, "in the

exercise of their equitable powers, use a different date, such as the date of separation, if one party has acted obstructively.” *Id.* (internal quotations omitted).

In this case, the record clearly establishes that Harold acted obstructively, resulting in several delays in the divorce proceedings. (R. 2155 ([Harold’s] efforts to avoid or delay discovery have cost [Valerie] a great deal in attorney’s fees and delays.”).) Thus, it would have been appropriate to value the marital residence and determine the parties’ respective shares of equity as of the time of separation, October 2001. Additionally, even applying the general rule, the value of the home should have been determined no later than September 2005, the date the decree of divorce was entered and the parties’ marriage was terminated. (R. 2207.) However, because Harold filed for bankruptcy in October 2005 (after the marriage was terminated), the trial court lacked jurisdiction over the marital home and was unable to fix the value of the residence at any date, let alone exercise its authority to adjust the parties’ share of equity to meet the unique circumstances in this case. (R. 2206.) Thus, Valerie requested that, in lieu of an award of equity, she be reimbursed for her payments to the parties’ first mortgage on the home.

The court rejected this request, stating “[Valerie] has received the benefit and comfort of living in the home and should not be granted judgment against [Harold] for having made the payments on the home.” (R. 2205.) “To grant her a judgment for unpaid alimony and child support, plus her mortgage payments,” the court reasoned, “would, in effect, grant her judgment twice and force [Harold] to pay twice.” (R. 2204.)

In so ruling, the trial court misunderstood Utah law. Valerie’s request was not to be compensated for her monthly living expenses; rather, Valerie’s request sought



reimbursement for the additional equity that she, alone, contributed to the marital home as a result of her payments made after the parties' separation.<sup>19</sup> Utah's courts have repeatedly recognized that a party's individual contributions to a marital residence are recoverable in a marital property award. *See Kerr v. Kerr*, 610 P.2d 1380, 1383 (Utah 1980) (“[I]t was undisputed that plaintiff contributed \$10,000 from her own separate funds to completely furnish the first home of the parties and when that home was sold and their current home was purchased, many of those furnishings were moved to and are still in the new residence. Plaintiff contributed another \$5,000 of her own funds in 1967 to retire the mortgage on this residence. In view of these undisputed facts the trial court did not abuse its discretion in awarding a greater portion of the marital property to the plaintiff than to the defendant.”); *Jensen*, 2008 UT App 392 at ¶¶ 3-4, 27 (affirming trial court's order that husband be reimbursed for one-half of the mortgage payments he made on property that was occupied by wife after separation and that was equally divided by the court).

As in *Jensen*, only one party in this case paid the first mortgage payments after the time of separation and, thus, only one party contributed to the increase in equity in the marital residence after the parties separated. In fact, Valerie paid over \$64,000 in mortgage payments throughout the four and one-half years before the trial in the divorce proceedings, which occurred over one year *after* Harold's request for a bifurcated decree of divorce was granted. Because Harold will share in the benefit of those contributions

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<sup>19</sup> It should be noted that Harold was ultimately only ordered to pay alimony in the amount of \$230 per month from May 2002 to October 2003. (R. 2175-76.) But the mortgage payment made by Valerie each month was \$1,194 per month. (Pl. Ex. 9.)

when the home is ultimately divided by the bankruptcy court, equity demands that Valerie be reimbursed in the amount of at least 50% of the payments she made toward the home in order to prevent Harold from receiving a windfall. Additionally, because the unique circumstances in this case justify departure from the presumptive rule of equal distribution given (1) Harold's repeated delays and contemptuous conduct, which resulted in prolonging the case over such a long period of time, (2) the entry of a bifurcated divorce decree over one year prior to the trial in this case, and (3) Valerie's demonstrated need, the trial court abused its discretion in refusing to award Valerie more than one-half of the payments she made on the home. Accordingly, this Court should reverse the trial court's ruling, hold that Valerie is entitled to be reimbursed for at least one-half of the payments made on the marital home after the parties separated, and remand for a consideration of any additional amounts Valerie should be awarded given the unique circumstances of this case.

**5. THE TRIAL COURT ERRED IN FINDING THAT VALERIE FAILED TO RAISE OR RESERVE HER RIGHT TO ARGUE FOR RETROACTIVE SUPPORT**

Lastly, this Court should hold that the trial court's finding that Valerie failed to raise and/or reserve her right to argue the issue of retroactive child support is against the clear weight of the evidence. In response to Valerie's request that Harold be ordered to pay retroactive child support for the six months prior to the entry of the temporary support order in May 2002, the trial court found as follows: "As far as the court can determine, this matter has never been brought before the court and has not been reserved by [Valerie]." (R. 2171.) However, this statement is contrary to the record.

Valerie's Complaint for Divorce, filed April 4, 2002, specifically requested that the award of child support "commenc[e] November 1, 2001." (R. 4). And, in the July 2002 Order, the court awarded Valerie child support in the amount of \$1,797 per month and held that "[Valerie] reserves the right to argue retroactivity of support." (R. 86.)

Valerie exercised that right in her Proposed Decision, which functioned as Valerie's closing argument. (R. 2265:720.) In that Proposed Decision, Valerie argued that, as a result of Harold's failure to provide any support to the family during the six months after separation, Valerie was forced to provide the sole support for the children and the family's living expenses even though she was unemployed. (R. 1911.) Therefore, Valerie requested that she be awarded "back child support in the amount of \$1,797 per month, as ordered by the Court in May 2002, for the months of October 2001 through April 2002." (*Id.*)

Because the clear weight of the evidence establishes that Valerie properly raised, and reserved her right to argue, the issue of retroactive support, the trial court's finding that Valerie failed to do is clearly erroneous. Thus, this Court should hold that Valerie is entitled to child support for the six months prior to the entry of the first order.

### **CONCLUSION**

Based on the foregoing analysis, this Court should reverse the trial court and order that Valerie be granted a new trial on the issue of alimony, including a determination of the parties' income, assets, and debts, that the Court award Valerie one-half of all child care expenses and at least one-half of the mortgage payments paid by her, and that Valerie be awarded all her attorney fees at trial and in bringing in this appeal.

Dated this 13<sup>th</sup> day of July, 2009,

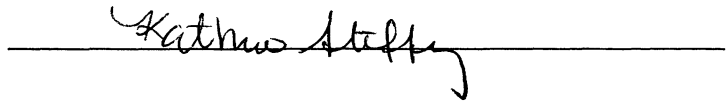
**SMITH HARTVIGSEN, PLLC**

  
\_\_\_\_\_  
Clark R. Nielsen  
Kathryn J. Steffey  
*Attorneys for Appellant/Petitioner Valerie Connell*

## CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2009, I caused to be served, via first-class U.S. mail, postage prepaid, a true and correct copy of the **BRIEF OF APPELLANT VALERIE J. CONNELL** addressed as follows:

Harold G. Connell  
1537 Nuttall Dr.  
Lehi, Utah 84043

A handwritten signature in cursive script, reading "Kathleen Steffy", is written over a horizontal line.

## **ADDENDUM**

- A. Memorandum Decision (Record No. 2026 – 2087)**
- B. Amended Findings of Fact and Conclusion of Law (Record No. 2096 – 2151)**
- C. Amended Decree of Divorce (Record No. 2152 – 2217)**
- D. Excerpts from November 14, 2006 Hearing (Record No. 2261, pages 43-45)**
- E. Utah Code Ann. § 30-3-3 (2002)**
- F. Utah Code Ann. § 30-3-5 (2002)**

Tab A

**FILED**  
MAY 29 2007  
4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

VALERIE J. CONNELL,	MEMORANDUM DECISION
Plaintiff,	
vs.	CASE NO. 024400765
HAROLD G. CONNELL,	DATE: 29 May 2007
Defendants.	Judge Claudia Laycock
	Division 3

This matter came before the Court for trial on November 22 and December 8, 19 and 20, 2006. Petitioner was present and represented by counsel, Douglas B. Thayer and Nancee Tegeder. Respondent was present and represented by counsel, Scott P. Card. Although there is also a protective order case pending (Case No. 064401019) between the parties, it is a separate matter and will not be addressed as part of this divorce case.

Subsequent to the trial, the parties have submitted proposed memorandum decisions to the court. The court has now reviewed the file, the evidence, and the proposed memorandum decisions and now enters its Memorandum Decision.

**FINDINGS OF FACT**

1. Valerie J. Connell ("the petitioner") and Harold G. Connell("the respondent") were married in November 22, 1986.
2. At the time of the marriage, petitioner had one daughter, Heather Stacey Connell, born August 23, 1982. Respondent adopted Heather in 1990.
3. The parties also had six biological children during the course of the marriage:



Meaghan Tovey Connell, born October 22, 1987; Spencer Ward Connell, born January 16, 1991; Cameron Wenger Connell, born October 17, 1993; Madison Evans Connell, born August 19, 1995; Cassidy Ford Connell, born December 23, 1997; and Caitlyn Phelps Connell, born April 8, 2000.

4. In 2001 the parties separated several times from the beginning of May through the summer. They separated on permanent basis in the beginning of Oct 2001.

5. The petitioner filed a petition for divorce on April 4, 2002.

6. Judge James R. Taylor signed an order bifurcating the proceedings and granting the petitioner a divorce on September 12, 2005.

7. On October 14, 2005--during the pendency of this divorce action--the respondent filed a bankruptcy petition in the United States Bankruptcy Court for the District of Utah ("Bankruptcy Court") (case no. 05-39070).

8. Together the parties own a home at 865 East Cascade Drive, Orem, Utah. On September 8, 2001, their monthly mortgage statement showed a balance owing of \$163, 562.45, while on September 8, 2001, the balance was \$163,562.45. Shortly before the time of trial--September 11, 2006--the balance was \$151,982.91.

9. Since October 2001 the petitioner has made all of the monthly payments on the home--a total of \$64,700.00.

10. The parties purchased the home for \$175,000.00 in 1995, at which time the home

had 3 finished bedrooms and 2 partially finished bedrooms.

11. During the marriage the respondent attempted to finish portions of the homes, including putting up, taping and mudding sheetrock, adding electrical outlets, framing closets, and working on, at least, one bathroom addition. He did the work himself, but was not a licensed contractor.

12. After the respondent moved out, the petitioner added built-in shelves and hanging bars in a bedroom, finished some of the electrical work, added all new framing around the windows and trim, texturized and painted some of the walls, re-did some of the drywall, and fixed some problems in one bathroom.

13. She also installed an intercom system (\$2,413.36, May 3, 2002), installed an outdoor shed \$425.00, July 6, 2004), replaced the furnace and the water heater (\$3,519.00, November 13, 2003)), and replaced the shake roof with an asphalt-shingled roof (\$10,752.00, September 9 and 13, 2005), installing "Sola tubes" (\$433.47, October 12, 2005). She also did other types of repair and home maintenance, as found in Exhibits 3 and 4.

14. A second mortgage or line of equity credit was taken out by the parties in January 2001 for the purpose of refinancing the RV and purchasing the Twin Lab stock. By stipulation of the parties at a hearing on May 7, 2002, the parties were ordered to sell the Twin Lab stock and use the proceeds to fix the RV's transmission so that the RV could be sold, using the remainder of the proceeds to pay on the line of credit. The proceeds from the RV were to be applied to the

line of credit, as well.

16. The respondent paid \$1,200 to repair the RV transmission; that sum did not come out of the stock proceeds. The RV was eventually sold for \$4,000, but the respondent gave the money to his attorney, who later gave the money to his bankruptcy trustee.

17. The respondent made the payments on the line of credit until October 2005; the petitioner has been making the payments since then. The debt balance is now approximately \$19,000.

18. The Twin Lab stock (10,000 shares) was purchased in March 2001 by the parties at the price of \$1.3125 per share for a total, minus commissions, of \$13,425.00. Its highest value was in April 2001, when it shot up to \$2.6400 per share, for a total value of \$26,400.00. It then began its decline in value, which continued until the parties sold the stock on March 3, 2003 for a value of \$1,209.46. At the time of the May 2, 2002 hearing, the approximate value of the stock was \$7,900, while at the time the order was signed on June 10, 2002, the approximate value of the stock was \$4,400.00.

19. Although the respondent changed the password to the account, the petitioner did nothing herself—other than several phone calls—to get access to the account or to sell the stock herself.

20. At the hearing on May 7, 2002 the parties also stipulated that the Novell stock purchased at the same time as the Twin Lab stock was awarded to the petitioner as her sole and

separate property and that the parties were mutually restrained from dissipating, encumbering, or hiding assets.

21. In May 2002, the respondent was ordered to maintain health insurance on the petitioner and the minor children during the pendency of this action. In October 2005, the respondent cancelled the petitioner's health insurance. The children were also not covered for a time after April 30, 2006.

22. The respondent failed to pay \$1,017.84 in health insurance premiums for August through November 2006. This court had previously entered judgments for other health insurance premiums not paid by the respondent.

23. In May 2002 the respondent was ordered to maintain car insurance on all of the parties' vehicles. From May 5, 2006 through the time of trial, the respondent failed to pay \$85.63 in car insurance premiums.

24. In May 2002 each party was ordered to pay one-half of all unreimbursed medical and dental expenses, commencing October 23, 2001. From May 2006 through the time of trial, the respondent failed to pay the petitioner \$82.50 for one-half of unreimbursed medical expenses.

25. In May 2002 the Court temporarily awarded the respondent the GMC truck and the LaSalle trailer. During the pendency of this action, the respondent sold the GMC truck for \$3,500.00 and LaSalle trailer for approximately \$1,500.00.

26. During 2003 the petitioner's average monthly child-care cost was \$1,116.67, with

the respondent's average monthly share amounting to \$558.33.

27. During 2004 the petitioner's average monthly child-care cost was \$1,601.83, with the respondent's average monthly share amounting to \$800.92.

28. During 2005 the petitioner's average monthly child-care cost was \$1,503.91, with the respondent's average monthly share amounting to \$751.95.

29. During 2006 petitioner's average monthly child-care cost was \$1,246.60, with the respondent's average monthly share amounting to \$623.30.

30. The petitioner travels for her employment approximately once per month for 3-5 days.

31. The petitioner spends approximately \$1,194.76 per month on her mortgage payments, \$84.75 on maintaining the residence, \$461.84 on food and household supplies, \$104.15 on utilities, \$207.93 on clothing, \$98.06 on medical and dental, \$1,200.96 on child care, \$314.20 on education, \$107.28 on entertainment, \$45.05 on grooming, \$136.51 on gifts, \$710.60 on donations, \$377.15 on auto expenses, \$1,900.00 on installment payments and \$87.74 on computer expenses. She also voluntarily donates \$710.60 per month to the LDS Church.

32. The petitioner currently works full-time and makes approximately \$6,669 gross per month in income. She began her new job in November 2003.

33. At the time of the parties' separation, they were living only on the respondent's income.

34. The respondent worked for the LDS Church from approximately June 2001 through October 2003. When he stopped working for the LDS church, he was earning approximately \$2,574.00 gross per two-week pay period, or \$5,577.00 gross per month (\$66,924.00 per year).

35. The respondent worked for BYU from October 2003 through February 17, 2006. Before the respondent was terminated from his position at BYU, he grossed approximately \$5,996.00 gross per month (\$71,952.00 per year). See Trial Exhibit 23 at p.5.

36. The respondent voluntarily resigned from BYU, because he failed to maintain an LDS temple recommend as required for employment. He lost his temple recommend because he was excommunicated.

37. The respondent began his current employment with Medicity in May 2006, where he earns \$5,000.00 gross per month (\$60,000.00 per year).

38. The respondent married Brenda Louise Bruni in October 2005.

39. The respondent pays his second wife's monthly house payment of \$752.00. He also pays her \$1,500.00 per month to help with living expenses.

40. Ms. Bruni's daughter, Sarah, has always lived with them. Her 18<sup>th</sup> birthday was in April, 2006, at which time Ms. Bruni's child support for Sarah ended. Sarah pays her mother \$360.00 per month (and sometimes less) to help with expenses.

41. Ms. Bruni's older daughter and infant child also lived with them from February through April 2006, as did Ms. Bruni's mother from January or February 2006. Her mother has

helped her financially at times. Her mother has terminal cancer.

42. In 1997 the petitioner received a gift of CINTAS stock from her uncle; she placed the CINTAS stock in a private and separate account.

43. The respondent accused her, during a session of marriage counseling, of not being a “team player”--due to the separate CINTAS stock account. Because of that accusation, she felt coerced to place the CINTAS stock into a joint account in January 2001.

44. The respondent’s name did not appear on the account’s monthly statements until April 2001; however, the respondent had access to the account as early as January 2001.

45. In April 2001 the respondent borrowed against the CINTAS stock to purchase other stock without the petitioner’s permission.

46. Subsequently, on July 19, 2001 the respondent sold the CINTAS stock for \$31,784.98. However, the parties only received approximately \$18,000 in cash, as the remaining amounts had been used by the respondent to purchase other stocks.

47. At approximately the same time the parties separated, the respondent took out a \$1,900.00 quick draw loan. The petitioner never saw this money, but she ultimately paid this loan back.

#### **I. BANKRUPTCY ISSUES RELATED TO THIS DIVORCE ACTION**

On October 14, 2005, the respondent filed a bankruptcy petition in the United States Bankruptcy Court for the District of Utah (“Bankruptcy Court”) (Case No. 05-39070). The

petitioner's claims for alimony, support and/or maintenance will receive a priority payment as part of distribution of the estate in the bankruptcy case.<sup>1</sup> Under Utah case law, said claims may also include attorneys' fees spent in pursuit of payment for alimony, support, maintenance, custody and/or visitation.<sup>2</sup>

Therefore, the petitioner is seeking to have this court categorize as many as possible as pre-bankruptcy-petition-filing judgments and as an award for alimony, support or maintenance (or fees incurred in obtaining these judgments) in order to protect her claims in Bankruptcy Court.

Further, the Bankruptcy Court will not consider any claims against the respondent that were incurred after his bankruptcy petition was filed, i.e., child support arrearages arising after October 2005. The Bankruptcy Court will only deal with claims against the respondent that arose prior to the respondent's filing of his bankruptcy petition.

## **II. BIFURCATION OF THE DIVORCE AND DATE OF THE DECREE**

On April 28, 2005, Respondent filed a Motion to Bifurcate Divorce and an Affidavit in Support. On May 16, 2005, Commissioner Patton denied Respondent's Motion to Bifurcate. On

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<sup>1</sup> As of the morning of the first day of trial, the bankruptcy court retained jurisdiction over the marital home only, leaving all personal property issues and other debt issues to this court. Therefore, this court makes no decision regarding the disposition of the parties' equity in the marital home.

<sup>2</sup>See *Seals v. Condie*, 139 P.3d 271, 277 (Utah App. 2006) ("Those determinations 'rest[] primarily in the sound discretion of the trial court.'" Cites omitted.).



September 1, 2005, Respondent filed a Motion to Reconsider Ruling for Bifurcated Divorce. However, as so many attorneys do, the respondent simultaneously submitted a proposed Bifurcated Divorce Decree. Judge James R. Taylor inadvertently signed the Bifurcated Divorce Decree on September 12, 2005.

Subsequently, on October 7, 2005, the parties came before Judge Taylor, who heard arguments and granted the respondent's motion to reconsider the commissioner's ruling. Later in the hearing, Judge Taylor discovered the signed Bifurcated Divorce Decree in the file; he then reprimanded the respondent's attorney for filing a motion to reconsider, instead of an objection to the commissioner's ruling. Nevertheless, he left his decision in place and granted the motion to reconsider. He did not order either party to prepare a new order of bifurcation, as neither attorney brought up that particular subject. There was absolutely no discussion between the attorneys and the court regarding a change of date for the decree.

This court can now only assume that Judge Taylor was content to leave the previously signed order in place. Therefore, this court will not amend the date nunc pro tunc (as requested by the petitioner), but will leave the date of divorce as September 12, 2005.

### **III. CUSTODY AND VISITATION**

Pursuant to an Order and Stipulation entered on July 28, 2006, the respondent shall not exercise or attempt to exercise visitation with the minor children unless the visitation time is supervised by a third party professional visitation supervisor such as ACAFS or WillWin. Due

to the prior sexual abuse issues involving the respondent and the children, the respondent has permanently waived his right to have unsupervised visitation. Thus, the petitioner is awarded sole legal and physical custody of the minor children.

Further, while the respondent may attend public functions in which the minor children are involved, such as plays or sporting events, he is not allowed to visit with the children before, during or after the events. Also, the respondent may not attend the church where the children are attending.

The only remaining issue at trial regarding visitation concerned telephonic visitation. Pursuant to the petitioner's testimony, the parties had previously agreed to the Guardian ad Litem's recommendation that the respondent be allowed to call the children between 5:00 p.m. and 8:00 p.m. on Tuesdays and Thursdays. The respondent did not dispute these times for telephonic visitation, nor did he dispute that he had previously agreed to these times. Further, the Guardian ad Litem recommended that the children should be allowed to call the respondent whenever they want. Neither party disputed this recommendation. In fact, when questioned at trial, the respondent agreed with the recommendation.

Accordingly, the respondent's telephonic visitation shall be set on Tuesdays and Thursdays between 5:00 p.m. and 8:00 p.m. or whenever the children want to call the respondent.

#### **IV. MARITAL HOME**

Due to the respondent's pending bankruptcy, this court does not have jurisdiction to

award either party equity in the marital home. Petitioner urges this court to make a finding that mortgage payments and home improvement expenses she has paid constitute family support and/or maintenance, because it was necessary to provide a habitable home for the children. Further, she urges the court to enter a judgment against the respondent for the amount that the petitioner spent on the mortgage and improvements.

#### **A. First Mortgage**

Petitioner has lived in the family home with the children and has made the payments on the first mortgage since the parties separated in October 2001. In addition, in May 2002 the court ordered the petitioner to make the first mortgage payments. See May 2002 Order at ¶ 7. On September 8, 2001, the debt on the marital home was \$163,562.45. See Trial Exhibit 1. On December 29, 2001 the debt on the marital home was \$162,837.44. Id. Shortly before the time of trial—September 11, 2006--the debt on the marital home was \$151,982.91. Id. Thus, in construing these numbers in a light most favorable to the respondent, the petitioner has paid approximately \$10,855 in principal since the parties separated ( $\$162,837 - \$151,982 = \$10,855$ ).

Further, the petitioner testified that she has spent approximately \$64,700 on principal and interest payments from the time the parties separated until the time of trial. Thus, Petitioner has spent approximately \$53,145 on interest payments for this time period ( $\$64,700 - \$10,855 = \$53,845$ ).

Since this court cannot award her any equity in the marital home, the petitioner requests

that this court enter a judgment against the respondent for the \$64,700.00 she has spent on principal and interest payments for the first mortgage since October 2001. Moreover, the petitioner requested that this court characterize said judgment as family support and/or maintenance since providing a home for the children is part of supporting or maintaining the family. The respondent did not dispute that the petitioner made such payments.

This court agrees with the respondent that the petitioner's argument is without merit. The petitioner has received the benefit and comfort of living in the home and should not be granted judgment against the respondent for having made the payments on the home. To grant her a judgment for the \$64,700 that she paid toward the mortgage would be the equivalent of granting her—or the respondent, for that matter, were the tables turned—credit and a judgment for paying rent, utilities, phone bills, light bulbs, toilet paper, and all other household necessities. Although all of those bills and items could be characterized as family support and/or maintenance (since the children need the benefit of all of those bills and items), the court cannot find any legal precedent for such a ruling.

In addition, she received (or should have received) support in the way of alimony and child support. She will receive a judgment for any such support not paid by the respondent during the pendency of this action. To grant her a judgment for unpaid alimony and child support, plus her mortgage payments, would, in effect, grant her judgment twice and force the respondent to pay twice. Such a ruling would be outside the bounds of equity.

The division of the marital home and any award of equity remains in the domain of the bankruptcy case. This court will not attempt to make any ruling in that regard, other than to note, again, that the petitioner has reduced the principal of the first mortgage by \$10,855.00 since the separation of the parties. No evidence was produced which would enable the court to calculate the reduction of the principal since the time of the bifurcated decree of divorce.

### **B. Home Improvement**

During the marriage the respondent attempted to finish portions of the home, including putting up, taping and mudding sheetrock, adding electrical outlets, framing closets, and working on, at least, one bathroom addition. He did the work himself, but was not a licensed contractor. The parties were, apparently, satisfied to let him attempt these improvements while they were married.

After the respondent moved out, the petitioner added built-in shelves and hanging bars in a bedroom, finished some of the electrical work, added all new framing around the windows and trim, texturized and painted some of the walls, re-did some of the drywall, and fixed some problems in one bathroom.

She also installed an intercom system (\$2,413.36, May 3, 2002), installed an outdoor shed \$425.00, July 6, 2004), replaced the furnace and the water heater (\$3,519.00, November 13, 2003)), and replaced the shake roof with an asphalt-shingled roof (\$10,752.00, September 9 and 13, 2005), installing “Sola tubes” (\$433.47, October 12, 2005). She also did other types of repair

and home maintenance, as found in Exhibits 3 and 4.

The petitioner claims that the respondent should pay the amount of \$21,885.33 for the work that she did or had done. See Trial Exhibits 3 and 4. However, this court does not believe that (1) the respondent should pay for all of the appropriate costs, but that the petitioner should share in the cost; and (2) that the respondent should pay for improvements and maintenance costs that were optional.

The court finds that the roof replacement (\$10,752.00) and the furnace and water heater replacements (\$3,519.00) were necessary and appropriate, as well as the garage door opener (\$298.00). However, the installation of an intercom system (\$2,413.36) was not necessary and the respondent should not have to share in that cost. Id. There were many items and costs in Exhibit 4 which were unexplained or appeared to be for minor repairs. This court views the normal, ongoing maintenance and repairs as part of the burden born by the party who has the benefit of living in the home, pending the conclusion of the divorce action.

Therefore, this court is not persuaded that the respondent should have to bear all of the costs, as outlined in Exhibit 4, nor should he have to pay for costs beyond those larger-ticket items which improved the value of the home.

Therefore, the parties shall share equally the following costs: roof replacement, \$10,752.00; furnace and water heater, \$3,519.00; and garage door opener, \$298.00. The court notes that the petitioner paid for the roof replacement on or about September 20, 2005, which

was when the petitioner paid the balance of the roofing cost. She paid for the furnace and water heater on November 13, 2003, two years before the decree was signed. She paid for the new garage door opener on January 6, 2004. All of these costs were incurred before the filing of the bankruptcy action.

The total amount to be shared by the parties is \$14,569.00. Each party will pay one-half or \$7,284.50. The respondent is ordered to pay a judgment in the amount of \$7,284.50 to petitioner for his share of the improvements to the home. For the purposes of the bankruptcy proceeding, this court characterizes this judgment as family support and maintenance, because improvement and maintenance expenses were necessary to provide the children with a habitable home. All of the \$7,284.50 was incurred before the filing of the bankruptcy action.

### **C. Home Equity Line of Credit/Second Mortgage**

A line of credit secured by a mortgage on the marital home was taken out by the parties in January 2001 for the purpose of refinancing the RV and purchasing the Twin Lab stock. By stipulation of the parties at a hearing on May 7, 2002, the parties were ordered to sell the Twin Lab stock and use the proceeds to fix the RV's transmission so that the RV could be sold, using the remainder of the proceeds to pay on the line of credit. The proceeds from the RV were to be applied to the line of credit, as well.

The respondent paid \$1,200 to repair the RV transmission; that sum did not come out of the stock proceeds. The RV was eventually sold for \$4,000. In an order signed on January 5,

2005 (from a December 2, 2004 hearing), the Court ordered the proceeds from the RV sale to be placed with the respondent's former attorney, James Faust, to hold in trust "until such time as the Court makes additional orders, or the parties stipulate in writing to a dispersal of the funds."

At the October 7, 2005 hearing before Judge Taylor, the parties stipulated that the RV proceeds should be applied to the line of credit. The respondent was present, according to the court's minute entry. However, the respondent gave the \$4,000 to his attorney, James Faust, then retrieved the money, and then gave the money to his new attorney, Theodore Weckel. The court has no evidence before it that the respondent gave his new attorney any instructions regarding the disposition of the money. Mr. Weckel gave the \$4,000 to the bankruptcy trustee. The court does not find the respondent in contempt for the transfer of the \$4,000 to the bankruptcy trustee, although the court finds that the respondent should pay an extra \$2,800 toward the balance owing on the line of credit (\$4,000 minus the \$1,200 to fix the RV).

The respondent made the payments on the line of credit until October 2005; the petitioner has been making the payments since then. The debt balance is now approximately \$19,000.

The Twin Lab stock (10,000 shares) was purchased in March 2001 by the parties at the price of \$1.3125 per share for a total, minus commissions, of \$13,425.00. Its highest value was in April 2001, when it shot up to \$2.6400 per share, for a total value of \$26,400.00. It then began its decline in value, which continued until the parties sold the stock on March 3, 2003 for a value



of \$1,209.46 and applied the proceeds to the line of credit. At the time of the May 2, 2002 hearing, the approximate value of the stock was \$7,900, while at the time the order was signed on June 10, 2002, the approximate value of the stock was \$4,400.00.

Although the respondent changed the password to the account, the petitioner did nothing herself—other than several phone calls—to get access to the account or to sell the stock herself. Both parties had the power to sell the stock, while neither party had the power to control the stock market and the value of the stock. Although the stock's value declined from May 2001 to the time of the May 2002 hearing, neither party sold the stock while its value remained higher than the original purchase price. By the time of the May 2002 hearing, the stock was already worth less than the parties had paid for it. Unfortunately, neither party possessed the prophetic powers necessary to out-guess the stock market, and neither party moved to sell the stock at an advantageous moment. The court holds neither party responsible for the low value of the stock when it was finally sold and awards neither party a judgment on this issue.

Therefore, the court divides the remaining balance on the line of equity equally between the parties (\$9,500 each), but orders the respondent to pay an extra \$2,800 for the proceeds of the RV which were not paid toward the line of credit. The court orders the respondent to pay a judgment in the amount of \$12,300.00 for his share of the remaining balance on the line of credit.

The court rejects a finding of contempt against the respondent with regard to either the

Twin Lab stock or the RV proceeds. All of the \$12,300.00 judgment was incurred before the filing of the bankruptcy action.

## **V. HEALTH INSURANCE**

### **A. Respondent's Failure to Maintain Health Insurance**

In May 2002, Respondent was ordered to maintain health insurance on the petitioner and the minor children during the pendency of this action. See May 2002 Order at ¶ 4.

However, in October 2005, the respondent cancelled the petitioner's health insurance. See Trial Exhibit 6.

The court already found that the petitioner made a prima facie case for contempt regarding the respondent's failure to maintain health insurance for the petitioner as ordered by the court. See Petitioner's May 2006 Order to Show Cause and Order on May 2006 hearing. Respondent reserved his right to argue at trial "that he should not be held in contempt, notwithstanding Petitioner making her prima facie case." Id.

Although the respondent testified at trial that he cancelled the petitioner's health insurance because he was planning to remarry, the Order states he was required to maintain her health insurance "during the pendency of this action"--not until he remarried. The respondent further testified that he was not aware of any changes to this Order. Thus, the respondent failed to meet his burden of showing why he should not be held in contempt for failing to maintain the petitioner's health insurance.

In addition, it is undisputed that the respondent lost insurance for the children on April 30, 2006. See also Trial Exhibit 6. The petitioner requested that the respondent be found in contempt for failing to maintain insurance on the children as ordered by the court. The respondent did not provide any evidence that he provided the children with new insurance immediately following the loss of coverage on April 30, 2006. In fact, the respondent admitted that he did not inform the petitioner about her COBRA options for the children when he learned about them in February.

Accordingly, the court finds the respondent in contempt for failing to maintain health insurance on the petitioner and the children. The petitioner is awarded her attorneys' fees and costs incurred in obtaining this finding. Further, this court makes a finding that maintaining health insurance is necessary for family support and maintenance in order to keep the children in good health.

#### **B. Respondent's Failure to Pay Health Insurance Premiums**

Respondent was ordered to pay all costs of premiums associated with health insurance. See May 2002 Order at ¶ 4. The petitioner testified that she obtained health insurance once she learned that the respondent had failed to maintain said insurance, yet the respondent failed to pay anything toward these premiums. On June 16, 2006, the court ordered the respondent to pay \$1050.73 in medical insurance premiums owed as of May 5, 2006.<sup>3</sup> See June 16, 2006 Order at ¶ 1. In addition, on August 28, 2006, the court ordered the respondent to pay health insurance

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<sup>3</sup>The respondent objected to the commissioner's ruling, but the objection was overruled by Judge Taylor.

premiums for June and July 2006, which totaled \$509.00.<sup>4</sup> See August 28, 2006 Order at ¶ 2. See also Trial Exhibit 5.

At trial, the petitioner testified that respondent owed her an additional \$1,017.84 in health insurance premiums for August through November 2006. Petitioner requested that the court enter a judgment against respondent for this amount. The respondent failed to provide any evidence that he had been paying insurance premiums to the petitioner.

Further, the petitioner requested that the respondent be found in contempt for his failure to pay any medical insurance premiums since insurance was cancelled for the petitioner and the children. Again, the respondent failed to provide any evidence that he had been paying insurance premiums during this time period.

Accordingly, a judgment will enter against the respondent for \$1,017.84 for unpaid health insurance premiums. In addition, the court finds the respondent in contempt for failing to pay insurance premiums after the petitioner's and the children's insurance was cancelled. Further, these judgments and any fees incurred in obtaining these judgments will be characterized as family support and/or maintenance, because health insurance premiums are necessary to keep the children in good health. Moreover, the petitioner is award her attorneys' fees and costs incurred in obtaining these judgments.

### **C. Future Health Insurance**

The petitioner testified that she would like to be the primary insurer for the children because of the difficulties she has faced in obtaining insurance coverage information from the

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<sup>4</sup>The court can find no objection in the file to this ruling.

respondent. The petitioner also requested that the respondent be required to pay one-half of the children's health insurance premiums under her plan. The court finds that these are reasonable requests, as the respondent has failed in the past to insure the children and to notify the petitioner when coverage ceased. It will be more beneficial to the children for the petitioner to be in charge of the insurance coverage and their health care. The court orders that the petitioner's insurance will be the primary coverage for the children and that the respondent will pay one-half of the cost.

If the respondent can obtain a secondary health insurance, which would, in effect, cover all health costs for the children which are not covered by the petitioner's insurance, the petitioner will pay for one-half of the cost of such insurance. Otherwise, the parties will simply pay one-half each of all uncovered health care costs for the children.

## **VI. CAR INSURANCE**

### **A. Respondent's Failure to Maintain Car Insurance**

In May 2002, the respondent was ordered to maintain car insurance on all of the parties' vehicles. See May 2002 Order at ¶ 5. The respondent testified that he was not aware of any changes to this Order. However, the petitioner testified that beginning in February 2005 the respondent failed to make full car insurance premium payments. Thus, on June 16, 2006, the Court ordered the respondent to pay \$1,063.11 in car insurance premiums owed as of May 5, 2006. See June 16, 2006 Order at ¶ 1.

From the time of this judgment until the time of trial, the respondent failed to pay \$85.63 in car insurance premiums. The respondent failed to provide any evidence to demonstrate

that the Order to maintain car insurance had changed or that he had, indeed, made all the necessary payments. In addition, the court finds no reason to modify the previous order.

Accordingly, the petitioner is granted a judgment against the respondent in the amount of \$85.63 for car insurance premiums. The court also finds that car insurance premiums are necessary for the support and/or maintenance of the family to allow them to get around and live their lives. Further, pursuant to the petitioner's request, the court finds the respondent in contempt for failing to obey this court order regarding car insurance. The court awards the petitioner her attorneys' fees and costs incurred in obtaining this judgment.

#### **B. Future Car Insurance**

The petitioners requests that the court order the respondent to pay for one-half of any future car insurance premiums for the children. The court agrees with the respondent that driving is a privilege and that such support is not mandatory for minors. This request is denied.

### **VII. MEDICAL EXPENSES**

#### **A. Respondent's Failure to Pay Medical Expenses**

In May 2002, each party was ordered to pay one-half of all unreimbursed medical and dental expenses, commencing October 23, 2001. See May 2002 Order at ¶ 4. The respondent testified that to his knowledge this Order has not been changed. In September 2004, the petitioner was awarded judgment against the respondent in the amount of \$231.00 for his share of medical costs. See September 2004 Order at ¶ 4. In addition, on June 16, 2006, the court ordered the respondent to pay \$1,589.60 for his share of medical expenses as of May 5, 2006. See June 16, 2006 Order at ¶ 1. The court found the petitioner made a prima facie case for the

respondent's contempt in failing to pay medical expenses for 2003 through 2005. See May 2006 Order at ¶ 5.

Also, the petitioner testified that currently the respondent owes her \$82.50 for one-half of unreimbursed medical expenses from May 2006 to the time of trial. The respondent failed to provide any evidence that he did not owe this amount or that he had paid this amount. Petitioner requested the Court to find the respondent in contempt for failing to pay medical expenses in 2006.

Accordingly, a judgment shall enter against the respondent in the amount of \$82.50 for unreimbursed medical expenses and the court finds him in contempt for failing to pay such. Further, all judgments awarded to the petitioner in this case regarding unreimbursed medical expenses, including attorneys' fees and costs incurred in obtaining these judgments, shall be classified as family support and/or maintenance because such expenses are necessary for the children's health. Moreover, the petitioner is awarded her attorneys' fees and costs incurred in obtaining these judgments. Also, since the September 2004 order entered before the respondent filed for bankruptcy, the \$231.00 shall be classified as a pre-bankruptcy petition claim. In addition, \$1,197.18 of the June 2006 judgment shall be classified as a pre-bankruptcy petition claim.

#### **B. Future Medical Expenses**

If the respondent obtains secondary insurance, which would in effect, cover all health costs for the children which are not covered by the petitioner's insurance, the petitioner will pay for one-half of the cost of such insurance. Otherwise, each party shall be responsible for one-half

of all future unreimbursed medical and dental expenses reasonably incurred by the minor children, including co-pays, deductibles and prescriptions, which are not paid by a medical insurance carrier.

If the respondent does obtain secondary insurance, the respondent must pay his share of the bills within 30 days after the secondary insurance rejects any costs. If the respondent chooses not to obtain secondary insurance, then the parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment. Within 30 days of receiving written verification of medical expense, the parent receiving verification shall pay one-half of the medical expense.

#### **VIII. PERSONAL PROPERTY**

On May 7, 2002, the court temporarily awarded the respondent the Subaru, GMC truck and LaSalle trailer. See May 2002 Order at ¶ 10. The respondent testified that he understood this court order and that he was not aware of any changes to this order. Nonetheless, the respondent admitted that he sold the GMC truck and LaSalle trailer in violation of this Court order. The respondent sold the GMC truck for approximately \$3,500.00 and the LaSalle trailer for approximately \$1,500.00.

The court awards the petitioner a \$2,500.00 judgment against the respondent in the amount of one-half of the proceeds from the sale of the truck and trailer. Further, the petitioner had already established a prima facie case of the respondent's contempt for disposing of marital assets. Respondent failed to provide any evidence that the May 2002 order had been modified or should have been modified. Thus, this court finds the respondent in contempt for selling these



items of marital personal property. Moreover, the petitioner is awarded her attorneys' fees and costs incurred in obtaining this judgment.

**B. Exercise Equipment and Entertainment Center**

In May 2002 the court temporarily awarded the respondent some exercise equipment and an entertainment center that were marital property. During the petitioner's testimony regarding these items, the court received the impression that these items were of great value, although the petitioner offered no evidence as to their value. Much to the court's surprise, the only evidence as to value came from the respondent, who testified that he purchased the used exercise equipment at an auction through Alpine School District at \$20.00 per item for a total of \$180.00. It would have been worth even less than that at the time the parties separated. His testimony was that the entertainment center was worth \$75.00.

The court is stunned at the time, effort, and attorney's fees that the petitioner expended in arguing this issue. These items were not worth an hour's time in attorney's fees. The court does not find the defendant in contempt for leaving the exercise equipment in Montana or giving

the cheap entertainment center to his new wife. The court will not award attorney's fees for this issue.

#### **D. Remaining Marital Personal Property**

At the beginning of this trial, the Bankruptcy Court retained jurisdiction over the parties' personal property. However, on the third day of trial, December 19, 2006, the trustee in the respondent's bankruptcy case abandoned all of the personal property. See Trial Exhibit 27. Thus, this court obtained jurisdiction over the remaining marital personal property.

Despite petitioner's testimony that the respondent has had multiple opportunities to go through the home and take whatever property he wanted, the court finds that, given the incredible acrimony between these parties and the existence of a protective order which prevents the respondent from going near the marital home, the respondent was wise in waiting for trial to request the return of just a few items.

Therefore, the court orders the petitioner to return the following items to the respondent: a punching bag, a DeWalt compound miter saw, a DeWalt router, a Milwaukee Sawzall, an electric planer, a 24-foot ladder, and the sewing machines which were gifts from his grandmother. The attorneys for the parties can aid in transferring these items from one party to the other.

### **IX. CHILD CARE EXPENSES**

#### **A. Respondent's Failure to Pay Child-Care Expenses**

In May 2002, each party was ordered to pay one-half of any work-related daycare expenses for the children. See May 2002 Order at ¶ 14. In September 2004, the petitioner was

awarded judgment against the respondent for his one-half share of daycare expenses, including \$4,560.00 for the year 2003 and \$3,030.00 for January 1, 2004 through August 31, 2004. See September 2004 Order at ¶¶ 5-6. In addition, on August 28, 2006, the court ordered the respondent to pay \$1,000.00 in child-care costs for the months of June and July 2006. See August 28, 2006 Order at ¶ 2. Of course, these judgments still stand, minus the garnishments of \$8,425.39 already taken by the petitioner.

In September 2004 the respondent was ordered to pay \$340.00 per month during the school year and \$500.00 per month during the summer months, for a total amount of \$4,560.00 per year.<sup>5</sup> Commencing with September 2004 and ending November 22, 2006 (the first day of trial), the respondent owed \$1,360.00 for 2004; \$4,560.00 for 2005; and \$4,136.00 for 2006 for a total owing of \$10,056.00. Judgment has already been given to the petitioner for June and July 2006 for \$1,000.00, leaving a total of \$9,056.00 for the court's calculations.

According to Exhibit 16, from October 2004 through November 22, 2006 the respondent paid \$7,280.00 (as well as other arrearages through garnishments).

#### **B. Judgment and Contempt**

The court grants judgment to the petitioner for the amount of \$1,776.00 in unpaid child-care expenses, pursuant to the September 2004 order of \$340.00 and \$500.00, for the months and years listed above. The court finds the respondent in contempt for his failure to pay the \$1,776.00 pursuant to the September 2004 order and awards petitioner her reasonable attorney's fees for this issue.

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<sup>5</sup>At that time both parties reserved the right to argue as to the reasonableness of that order.

This judgment<sup>6</sup> for child-care expenses and attorneys fees incurred in obtaining judgments for child-care expenses shall be classified as family support and/or maintenance, because it directly relates to taking care of the children. Also, pursuant to the petitioner's testimony and Exhibit 16, \$978.00 of this judgment shall be classified as a pre-bankruptcy petition judgment—the total due from September through December 2004 of \$1,360.00, plus January through October 14, 2005 of \$3,710.00, minus the amount the respondent paid during this time period (\$1,020, plus \$3,072 for a total of \$4,092.00.<sup>7</sup>

### **C. Petitioner's Request for Increased Child-Care Expenses, Past and Future**

The court has looked at the petitioner's testimony and Exhibit 16 very carefully and makes the following observations:

1. During 2003 the petitioner's average monthly child-care cost was \$1,116.67, with the respondent's share amounting to \$558.33.
2. During 2004 the petitioner's average monthly child-care cost was \$1,601.83, with

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<sup>6</sup>In the petitioner's suggested memorandum decision, her calculations included her figures for the larger amount she seeks for child-care expenses, as well as the past judgments and past garnishments. The court will not attempt to run those calculations at this time, as those judgments and garnishments were not truly before the court at trial. However, for purposes of the bankruptcy action, the court will find that all judgments awarded to the petitioner for amounts incurred before October 14, 2005 should be considered pre-bankruptcy in nature and should also be classified as family support and/or maintenance.

<sup>7</sup>Exhibit 16 failed to provide monthly amounts paid by the respondent, so the court has assumed some logical facts in order to bring finality to this issue. The court has arrived at the September through December 2004 credits for the respondent by noting that the \$1,020 paid in 2004 is exactly 3 months at \$340.00. Apparently, the respondent finally made some payments after Commissioner Patton lowered the amounts. As for 2005, the court simply took the annual total of \$4,560.00, divided it by 12, and multiplied that result by 9.5 months.

the respondent's share amounting to \$800.92.

3. During 2005 the petitioner's average monthly child-care cost was \$1,503.91, with the respondent's share amounting to \$751.95.

4. During 2006 petitioner's average monthly child-care cost was \$1,246.60, with the respondent's share amounting to \$623.30.

5. The petitioner urges the court to award her an ongoing child-care amount of \$400 per week (\$20,000 per year/\$1,666.67 per month/\$833.34 respondent's share)<sup>8</sup> for "nanny" care, which she deems necessary, because she travels approximately once per month for 3-5 business days.

6. The petitioner now works at a job which brings her approximately \$80,000.00 annual salary, which is more than the respondent now makes.

The parties' minor children are now 16, 13, 12, 9 and 7 years of age; the two older children are 19 and 24 years of age.<sup>9</sup> The petitioner's argument is that, because of her occasional travel for work, the respondent should help her pay for full-time nanny care. The court finds this unreasonable. All of the children are in school full-time, so there is no need for full-time care during the school year, and only two of the children are still in elementary school. The older children certainly can be expected to help with the younger children; indeed, the oldest boy does not have football practice after school year-round. The infrequency of the petitioner's work-related travel does not justify the request that the respondent pay \$833.34 per month for his share

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<sup>8</sup>The court calculated this with a 50-week work year.

<sup>9</sup>As of the time of this decision—not the time of trial.

of the child-care expenses. Although the petitioner is correct in asserting that the respondent offered no other reasonable suggested costs for child-care expenses, neither did the petitioner.

Therefore, the court finds that the amounts previously ordered are within the realm of reason and also within this court's experience on the bench. The court will order the respondent to pay ongoing child-care expenses of \$340.00 per month during the nine months of the school year and \$500.00 per month during the three months of the summer vacation, for a total of \$4,560.00 per year. With the petitioner paying equal amounts, this should be quite adequate for the children's needs.

## **X. ALIMONY**

### **A. Respondent's Failure to Pay Two Months' Alimony**

The respondent was ordered to pay \$230 per month in alimony, beginning April 1, 2002. See May 2002 Order at ¶ 3. At a hearing on May 15, 2006 the parties stipulated that the petitioner made a prima facie case on her order to show cause regarding alimony payments for March and April 2006. See Order and Stipulation signed July 28, 2006 at ¶ 5.

At a hearing on June 15, 2006, the respondent failed to present any evidence that he paid these amounts or that he was justified in failing to pay these amounts. Thus, the court makes a finding that the respondent was in contempt for failing to pay two months of alimony payments. On June 15, 2006, the court ordered the respondent to pay \$460.00 in alimony arrearages incurred as of April 13, 2006. See Order signed July 28, 2006 at ¶ 1. The court awards the petitioner her attorneys' fees and costs incurred in obtaining these judgments.

As of the time of trial, the respondent was current on his alimony obligations.

The court file is replete with the respondent's early efforts to reduce the temporary alimony obligation of \$230.00 per month. He filed 3 verified motions to have his support orders reduced or adjusted. These motions were finally heard at a hearing on June 24, 2004, at which Commissioner Patton took care of some issues, including child support, but reserved all other matters for trial, including alimony. Therefore, the court finds that the respondent did properly preserve his right to argue for retroactive adjustment (and possible credit) of alimony as of August 6, 2003, which is when the second motion (which mentioned alimony specifically) was filed with the court. Petitioner reserved the same right in May 2002. The court will make any adjustments for retroactivity after determining the correct income to be attributed to the parties.

#### **B. Past and Future Alimony**

The petitioner requests that the respondent be ordered to pay future alimony, while the respondent requests that his alimony obligations cease. He has withdrawn his request for alimony from the petitioner. In determining whether to award alimony, the court considers:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support . . .
- (b) The court may consider the fault of the parties in determining alimony.

U.C.A. § 30-3-5(8).

#### **1. The Financial Condition and Needs of Petitioner**

The petitioner spends approximately \$1,194.76 per month on her mortgage payments, \$84.75 on maintaining the residence, \$461.84 on food and household supplies, \$104.15 on utilities, \$207.93 on clothing, \$98.06 on medical and dental, \$1,200.96 on child care, \$314.20 on

education, \$107.28 on entertainment, \$45.05 on grooming, \$136.51 on gifts, \$710.60 on donations, \$377.15 on auto expenses, \$1,900.00 on installment payments and \$87.74 on computer expenses. See also Trial Exhibit 9.

Petitioner also testified that her current net monthly gross income is \$6,669.08. The court notes, with some surprise, that the petitioner declares no exemptions and, thereby, increases the amount of taxes taken from her gross income. Therefore, her net income is an artificially low \$4,121.30. Id. She also voluntarily donates \$710.60 per month to the LDS Church. Therefore, without the inclusion of the church donation, the alimony and child support she is currently receiving, minus deductions and expenses as outlined above, the petitioner is deficient approximately \$2,548.75 per month. Id.

## **2. The Recipient's Earning Capacity or Ability to Produce Income**

The petitioner is currently working full-time and makes approximately \$6,669 gross per month in income. Id. The respondent did not provide any evidence that the petitioner is working below her earning capacity or that she is able to produce more income. Thus, the court finds that the petitioner is able to earn \$6,669 gross per month. At the time of the parties' separation, they were living only on the respondent's income. She began her new job in November 2003.

## **3. The Ability of Respondent to Provide Support**

Respondent worked at Novell from August 1998 through approximately June 2001. From January 2001 through about June 15, 2001 he grossed \$47,879.77. See Trial Exhibit 18. Thus, in construing this amount in a light most favorable to the respondent, he grossed approximately \$7,979 per month (\$47,879 for 6 months) while working at Novell.



The court finds credible the respondent's testimony that he voluntarily left this employment at Novell for a lower paying job, because he was afraid he would be laid off before finding another job.<sup>10</sup> The court is persuaded by the respondent's argument that the computer industry is volatile with regard to steady employment and that it was reasonable for the respondent to protect his family and his income by finding a new job before being laid off. In addition, this change of employment occurred before the parties' separation and the filing of this divorce.<sup>11</sup> This court refuses to delve into decisions made by the parties before the time of the separation, as it is not the duty of this court to revise decisions made by the parties before this court had jurisdiction. Thus, the court makes no finding as to respondent's income at Novell and will not include the income at Novell in its calculations and decision regarding imputation of income.

After leaving Novell, the respondent secured employment with the Corporation of the Presiding Bishop ("LDS Church"). He worked for the LDS Church from approximately June 2001 through October 2003. When he stopped working for the LDS church, he was earning approximately \$2,574.00 gross per two-week pay period, or \$5,577.00 gross per month (\$66,924.00 per year). See Trial Exhibit 21.

While employed with the LDS church, the respondent was recruited by Brigham Young University ("BYU"). He worked for BYU from October 2003 through February 17, 2006.

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<sup>10</sup>The many reductions in the employee force at Novell through the last decade have been front-page news in this community.

<sup>11</sup>The petitioner's testimony was that she opposed his change of employment, while the respondent testified that it was a mutual decision.

Before the respondent was terminated from his position at BYU, he grossed approximately \$5,996.00 gross per month (\$71,952.00 per year). See Trial Exhibit 23 at p.5. The respondent voluntarily resigned from BYU, because he failed to maintain an LDS temple recommend as required for employment.<sup>12</sup> He lost his temple recommend because he was excommunicated.

The respondent began his current employment with Medicity in May 2006, where he earns \$5,000.00 gross per month (\$60,000.00 per year).

The petitioner urges the Court to make a finding that the respondent has the ability to earn his previous BYU income (\$5,996 per month) since he voluntarily acted in such a way as to cause him to lose his employment. In contrast, the respondent requests that the court use his current income of \$5,000 per month in determining alimony, if any.

Pursuant to Utah Code Ann. § 78-45-7.5(7)(a), if the respondent is voluntarily unemployed or underemployed, income may be imputed to him. “Income may not be imputed to a parent unless the parent . . . is voluntarily unemployed or underemployed.” U.C.A. § 78-45-7.5(7)(a). Utah case law suggests that a parent is voluntarily unemployed or underemployed if, at least, some evidence suggests that the parent’s current, diminished income level resulted from

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<sup>12</sup> At the August 24, 2006 hearing before Judge Taylor, the court ordered that the petitioner could depose the respondent regarding the “temple recommend issue.” See Order, signed November 13, 2006. The petitioner claims that, due to the respondent’s subsequent discovery delays, the petitioner was not able to depose the respondent on this matter.

The petitioner cites a November 2006 Order on Motion for Default Judgment, stating that it “provides that if ‘Petitioner is unable to present the necessary evidence based on Respondent’s failure to provide necessary evidence through discovery, Respondent will be precluded from defending on such issues.’” The court can not find such order in the file, nor does the court recall the petitioner asserting this theory in trial. In addition, testimony was taken from the respondent in which he explained that he voluntarily resigned, rather than allowing himself to be fired by BYU.

“his personal preference or voluntary decisions,” instead of from “events beyond his control.”

*Hall v. Hall*, 858 P.2d 1018, 1025 (Utah Ct. App. 1993).

The court has already indicated that it will not consider the pre-separation income from Novell; therefore, the court will consider the incomes earned by the respondent at the LDS Church, BYU, and Medicity. Again, those monthly incomes are: (1) \$5,577.00 gross per month (\$66,924.00 per year) at the LDS Church; (2) \$5,996.00 gross per month (\$71,952.00 per year) at BYU; (3) \$5,000.00 gross per month (\$60,000.00 per year) at Medicity.

The highest income of the three is the BYU income at \$5,996.00 gross per month. This is income which the respondent lost, because of activities which resulted in his excommunication from the LDS Church and his subsequent inability to hold a temple recommend. Unlike his voluntary departure from Novell for a lower-paying job in lieu of a possible layoff, his voluntary resignation from BYU was the result of his own actions. Therefore, the court finds that the respondent could, most likely, still be earning this income today, had he not voluntarily failed to satisfy the requirements for continued employment at BYU. Thus, the court finds that the respondent is voluntarily underemployed pursuant to U.C.A. § 78.45-7.5(7)(a).

Accordingly, the court finds that respondent has the ability to earn \$5,996.00 gross per month (\$71,952.00 per year).

The respondent married Brenda Louise Bruni in October 2005. As part of a pre-nuptial agreement signed by the respondent and Ms. Bruni, he pays her monthly house payment of \$752.00. See Trial Exhibit 30 and 35. He also pays her \$1,500.00 per month to help with living expenses.

Ms. Bruni's daughter, Sarah, has always lived with them. Ms. Bruni no longer receives any child support for Sarah, but Sarah pays her mother \$360.00 per month (and sometimes less) to help with expenses. Ms. Bruni does not consider this regular income, as Sarah does not always have the money to pay. Ms. Bruni's older daughter and infant child also lived with them from February through April 2006, as did Ms. Bruni's mother from January or February 2006. Her mother has helped her financially at times, but it is not income that can be depended upon. Her mother has terminal cancer.

"In determining alimony, the income of any subsequent spouse of the payor may not be considered, except . . . [t]he court may consider the subsequent spouse's financial ability to share living expenses . . . ." U.C.A. § 30-3-5(8)(g)(iii)(A). This court does not find that Ms. Bruni's medical history, recent work history, and spotty income from her daughter justify great reliance upon Ms. Bruni's income for determining the appropriateness of alimony. The occasional gifts of money from Ms. Bruni's mother cannot be considered income for purposes of this determination. It is clear to this court that the respondent would have to pay at least \$752.00 per month to rent a decent place to live for himself, were he not remarried and living in Ms. Bruni's home. The payment of \$1,500 per month by the respondent to Ms. Bruni to help defray living expenses is certainly not unreasonable, given today's economy and the monthly expenses claimed by both the petitioner and the respondent. The money she brought from Oregon after her divorce is now gone, so she no longer has any reserve cash to supplement her income.

The court finds that, pursuant to U.C.A. § 30-3-5(8)(g)(iii)(A), there is no steady income from Ms. Bruni that the court can include in its calculations. Ms. Bruni is not capable of

sharing the living expenses with the respondent, other than the \$360.00 from her daughter, which only covers Sarah's expenses in the home (food, utilities, etc.).

#### **4. Length of Marriage**

The parties were married on November 22, 1986 and divorced on September 12, 2005. Thus, the parties were married two months short of 19 years.

#### **5. Whether Petitioner has Custody of the Minor Children**

As set forth above, the petitioner has full physical and legal custody of five minor children that require support. The respondent will be ordered to pay child support based upon his imputed income of \$5,996.00.

#### **6. The Fault of the Parties**

Although the petitioner only alleged "irreconcilable differences" her divorce petition, she testified that the divorce was caused by the respondent, because he sexually abused the children. She never amended the petition, and neither party testified as to when the sexual abuse of the children occurred.

The petitioner also testified that in January 2001 she placed the CINTAS stock into a joint account, due to pressure from the respondent during marriage counseling sessions, which had begun in December 2000. Neither party offered an explanation for their participation in marriage counseling at that time, which was many months prior to the parties' final separation in October 2001.

Therefore, the court finds that it does not have enough clear testimony to place all of the blame on the respondent for this divorce, despite the unopposed testimony regarding the

sexual abuse of the children. Thus, this court makes no finding that the respondent alone caused the marriage to terminate.

#### **7. Analysis under U.C.A. § 30-3-5(8)**

The petitioner requests that the court order the respondent to pay future alimony in the amount of \$3,259 per month for 19 years. The respondent withdrew his request for future alimony, but requested a credit for the alimony he has paid since the petitioner became employed in the spring of 2003.

While this is a marriage of almost 19 years' duration, the court can see no reason to award the petitioner alimony for another 19 years, especially when she is making more money than the respondent makes—even using the court-imputed income of \$5,996.00 per month for the respondent. Their incomes differ by \$673.00 per month and \$8,076.00 per year—with the advantage going to the petitioner. In addition, the parties had chosen to have the petitioner stay at home to raise the children and were living on only one income when they separated in October 2001. She did not return to full-time work until the spring of 2003 and later that year obtained her current employment with an income now of \$80,000.00 per year. Together they are bringing in \$151,952.00 per year (his imputed income of \$71,952.00, plus her income of \$80,000.00), compared to the \$66,924.00 per year the respondent was making at the LDS Church when they separated in October 2001. Their collective income has more than doubled since their separation.

In addition, since the petitioner has the physical custody of the children, she will also be receiving \$4,560.00 per year from the respondent for child-care expenses, along with child

support of \$16,728.00 per year (\$1,394.00 per month). This is a total of \$21,288.00, above and beyond her annual salary of \$80,000.00.

Were this court to award the petitioner the monthly alimony of \$3,259.00 she seeks, plus the monthly average child-care cost of \$380.00 awarded to her by the court (for a total of \$3,639.00), the respondent, according to his financial declaration, would have \$73.46 left of his net income to pay child support and the rest of his monthly expenses. See Exhibit 35.<sup>13</sup> This would be an unconscionable award to the petitioner.

So, does the petitioner deserve any alimony at all? This court finds that she did—during the time after the filing of this action before she obtained her new well-paying job. The parties' agreement in May 2002 was \$230 per month, which the parties, obviously, thought was appropriate at the time. The court also finds that \$230 per month was appropriate until the petitioner began her new job in November 2003. Therefore, the court awards the respondent a credit against other amounts due under this Memorandum Decision (or other judgments already awarded) from November 2003 through the time of trial, November 2006, inclusive. That would be calculated at \$230.00 x 37 months, for a total of \$8,510.00. Therefore, the respondent will receive a credit of \$8,510.00 for alimony already paid.

Because the parties' income and living circumstances are comparatively even and their collective income has more than doubled since the time of their separation in October 2001, the

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<sup>13</sup>The court has imputed income \$996.00 above what the respondent used in his financial declaration, so the court is not able to correctly estimate what his net income would be. He lost 29% of his real income through deductions; if the court used that same 29% and subtracted it from his imputed monthly income, that would leave him \$4,257.16 of his imputed income, for an increase of \$691.62 net. This is still not enough for him to live on and pay child support.

court denies the petitioner her request for future alimony and makes no order regarding future alimony.

## **XI. CHILD SUPPORT**

### **A. Respondent's Contempt for Unilaterally Changing Child Support**

In May 2002, the respondent was ordered to pay \$1,797.00 per month in child support beginning April 1, 2002. See May 2002 Order at ¶ 3. This amount was agreed upon by the parties, stipulated to in court, and based upon their incomes at the time.

At a hearing on June 24, 2004, the court ordered that the respondent's child support obligation would be reduced to \$1,169.00 per month for six children based upon the parties' current incomes. See Order signed August 5, 2004 at ¶ 4. This order was based upon petitioner's income of \$6,250.00 per month gross (\$75,000.00 per year) and respondent's income of \$5,750.00 per month (\$69,000.00 per year). The new amount was effective July 1, 2004.

No evidence was presented to the court that this order was ever modified, nor can the court find any orders of modification in the file.

From November 2005 through February 2006, the respondent paid child support of only \$1,090. See also Trial Exhibit 10. From March 2006 through May 2006 he only paid \$45 per month. Id. Finally, the respondent only paid \$840 per month in child support from June 2006 through August 2006. Id.

At a hearing on May 15, 2006, the parties stipulated that the petitioner had established a prima facie case regarding the respondent's contempt for underpaying his monthly child support obligations without leave of the Court. See Order signed July 28, 2006 at ¶ 5. The



respondent reserved his right to dispute the contempt issue. At trial the respondent admitted that he was aware of the court orders regarding child support, and he failed to provide any evidence that the June 2004 order ever changed. Accordingly, the court holds the respondent in contempt for underpaying his child support payments without leave of the court.

### **B. Respondent's Failure to Pay Child Support**

Respondent's child support obligation of \$1,169.00 per month was originally calculated for six minor children based on Petitioner's gross income of \$6,250 per month and Respondent's gross income of \$5,750 per month. See Order signed August 5, 2004 at ¶ 4. Although it is undisputed that one of the minor children turned 18 in October 2005, such does not automatically entitle the respondent to unilaterally reduce his child support obligations without a court order. Not only did the number of minor children change, but the parties' gross monthly incomes were also different at that time. If the court allowed a party to unilaterally make changes to court-ordered obligations every time he or she determined a change in circumstance had occurred, it would nullify the authority of the court and render petitions to modify meaningless. Thus, the respondent did not have authority to unilaterally change (and underpay) his child support obligations.

As a result, on June 16, 2006, the court awarded the petitioner a judgment of \$2,248.00 in child support arrearages as of April 13, 2006. See Order signed July 28, 2006 at ¶ 1. In addition, on August 28, 2006, the court awarded the petitioner a judgment of \$2,103.00 in child support arrearages. See Order signed November 21, 2006 at ¶ 2.

Further, pursuant to the petitioner's testimony at trial, the court awards the petitioner a

judgment against the respondent for \$489.68 in additional child support arrearages.

The court also finds that these judgments (and attorney's fees spent in obtaining these judgments) are classified as family support and/or maintenance, because child support is necessary to provide the children with a living. Moreover, the petitioner is awarded her attorneys' fees and costs incurred in obtaining these judgments against the respondent regarding child support and as a sanction for the respondent's contempt.

The respondent requested a credit for child support he paid while the petitioner was working from the spring of 2003 until it was actually reduced in July 2004. He also requested to have child support recalculated from October 2005 to the present. However, the respondent failed to present any evidence regarding the petitioner's varying incomes during these time periods.

Therefore, the court has no evidentiary basis for determining what credit, if any, to which the respondent would be entitled. Rather than recalculating years of child support and attempting to determine both parties' income over the course of those months and years, the court in its discretion will simply determine child support from the time of trial going forward. Accordingly, the respondent is not entitled to a credit for child support paid from the spring of 2003 through July 2004, nor is he entitled to a recalculation of child support from October 2005 to the present.<sup>14</sup>

### **C. Child Support from October 2001 through April 2002**

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<sup>14</sup>Indeed, given the income imputed to the respondent, he might be less than satisfied with the result, were the court to recalculate all child support since the inception of this divorce action.

Petitioner testified that before the parties separated, the respondent used to deposit his paycheck into the bill-paying account to cover family expenses. See Trial Exhibit 12. However, from the time the parties separated in October 2001 until the respondent was ordered to pay child support as of April 1, 2002, the respondent failed to provide any support to the family. Id. The petitioner testified that she was forced to solely provide for all of the children and family living expenses from her own funds during this time period even though she was not working. She now asks for back support for that six-month period.

As far as the court can determine, this matter has never been brought before the court and has not been reserved by the petitioner. The court will not go back to the parties' separation to award back child support.

#### **D. Future Child Support**

Utah Code Ann. § 78-45-7.5(7)(a) allows this court to impute income to the respondent for purposes of child support if he is voluntarily unemployed or underemployed. Using the same analysis as it did in the above section on alimony, the court finds that the respondent is voluntarily underemployed pursuant to U.C.A. § 78.45-7.5(7)(a) and income shall be imputed to him at \$5,996.00 gross per month (\$71,952.00 per year) for purposes of calculating child support. Petitioner's income for purposes of child support shall be \$6,669 gross per month (\$80,000.00 per year). See Trial Exhibit 9. Child support shall be calculated for five minor children.

Since the time of trial, the Utah State Legislature has modified the child support income tables, effective April 30, 2007, for modified and future child support. Rather than estimating the base child support amount under the prior statute, the court has used the new

statutory amount established for combined incomes of \$12,665.00 per month as a guideline.

Using the above-listed incomes, the court has determined that (1) the combined income of the parties is \$12,665.00 per month; (2) the base child support for their income is \$2,967.00; (3) the petitioner makes 53% of the combined income, while the respondent makes 47% of the combined income; (4) the parties' respective shares of the child support obligation are: petitioner, \$1,573.00 and respondent, \$1,394.00.

The court orders the respondent to pay \$1,394.00 for the support of the five minor children as of the first date of trial, November 22, 2006.

## **XII. STOCKS**

### **A. Novell Stock**

On May 7, 2002, the court awarded the petitioner the Novell stock as her sole and separate property, pursuant to a stipulation of the parties. See May 2002 Order at ¶ 9. The petitioner testified that she sold this stock in December 2004 and used the \$14,000.00 she received for attorney's fees. The respondent testified that he is not making a claim for this stock, but argues that the court "can consider this stock division in the other property divisions and do equity in this case." As the respondent provided no support for the petitioner during the early months of their separation, the court is not inclined to set off this stock and its value against any other property of the marriage. Thus, the respondent shall not receive a credit for this amount.

### **B. CINTAS Stock**

In 1997 the petitioner received a gift of CINTAS stock from her uncle; she placed the CINTAS stock in a private and separate account. See Trial Exhibit 2 at January 2001 statement.

The respondent accused her, during a session of marriage counseling, of not being a “team player”--due to the separate CINTAS stock account. Because of that accusation, she felt coerced to place the CINTAS stock into a joint account in January 2001. Id. at April 2001 statement. The respondent’s name did not appear on the account until April 2001; however, the respondent had access to the account as early as January 2001.

In April 2001 the respondent borrowed against the CINTAS stock to purchase other stock without the petitioner’s permission. Id. Subsequently, on July 19, 2001 the respondent sold the CINTAS stock for \$31,784.98. Id. at July 2001 Statement. However, the parties only received approximately \$18,000 in cash, since the remaining proceeds were used to pay off the respondent’s outstanding debt for the purchase of the other stocks. The petitioner has not successfully demonstrated for the court that she did not receive any benefit from the remaining monies, which were used to buy other stocks.

The court finds that the CINTAS stock was the petitioner’s separate property and that it retained its separate identity, despite being moved into a joint account. The respondent certainly did not contribute to the enhancement, maintenance, or protection of the stock or its value and did not, thereby, acquire an equitable interest in it. Oliekan v. Oliekan, 147 P.3d 464, 469 (Utah Ct. App. 2006), citing Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988). Therefore, the petitioner is entitled to a judgment of \$18,000.00 against the respondent.

The petitioner testified that she used the \$18,000 in cash to support the family between the time the parties separated in October 2001 until the May 2002 Order entered. See also Trial Exhibit 11 and 12. Since this \$18,000.00 was her sole and separate property and marital funds

should have been used to support the family instead, the court now awards her a judgment for \$18,000.00 and, further, finds that this \$18,000 is classified as family support and/or maintenance, since the funds were spent to support the family. This \$18,000.00 debt was incurred before the filing of the bankruptcy petition judgment.

**C. TwinLabs Stock**

Refer to “Home Equity Line of Credit/Second Mortgage” category above.

**XIII. MARITAL DEBTS**

**A. Pre-separation Debt**

After the parties separated, the petitioner transferred a joint, marital MBNA credit card debt of \$2,400.00 into her name only; the respondent does not dispute that the MBNA debt is a marital debt. The court awards judgment now against the respondent for \$1,200.00, as his share of his marital debt.

**B. Debt During Separation**

At approximately the same time the parties separated, the respondent took out a \$1,900.00 quick draw loan. The petitioner testified that she never saw this money, but that she ultimately paid this loan back. The respondent failed to offer any evidence regarding this issue. The court shall now awards the petitioner a judgment against the respondent for \$1,900.00. This debt was incurred before the filing of the bankruptcy petition judgment.

**XIV. TAX EXEMPTIONS**

The respondent requested that the parties split the tax exemptions every year. The court makes the following order: (1) The parties will split the tax exemptions each year; (2) If

there is an odd number of children still receiving child support, the parties will alternate the extra deduction every other year with the petitioner being granted the odd-child exemption on odd-numbered years and the respondent being granted the exemption on even-numbered years. Therefore, for example, the petitioner will claim the odd-child exemption this year, 2007.

However, the respondent may not claim the children as tax exemptions unless he is current on his obligations to the children, pursuant to the appropriate statutes which deal with this issue.

## **XV. CONTEMPT**

### **A. Respondent's Contempt for Repeated Discovery Delays (i.e., Psychological Records, Financial Records, Changing Position Regarding Custody) and Failures to Comply with Court Orders**

Petitioner requested that the court find the respondent in contempt for his numerous discovery delays and repeated failures to comply with court orders; she also requested a monetary judgment against the respondent as a sanction. While the court holds both parties responsible for their failures to respond adequately to discovery requests, the court will not find the respondent in contempt for altering his goals in this litigation, i.e., supervised visitation, etc. The nature of divorce litigation is that, after discovery, court hearings, and negotiations, parties change their minds about what should be pursued during the litigation. Holding parties in contempt for changes of strategy would stagnate divorce litigation and prevent settlement. In addition, the court will not hold the parties in contempt for failure to provide discovery regarding discovery which would have never been admitted, pursuant to state statutes, i.e., polygraph results. Finally, the court will not hold the respondent in contempt for filing his bankruptcy petition, as the court

has no persuasive evidence before it that the only reason for filing the petition was to delay the divorce proceeding.

On November 8, 2006, the petitioner filed a Motion for Default Judgment and memorandum in support (“Default Judgment Memorandum”), wherein she outlined a history of the respondent’s repeated discovery delays and failures to comply with court orders. See November 8, 2006 Default Judgment Memorandum.

Beginning in July 2002, the petitioner served her first discovery request upon the respondent. See August 2002 Certificate of Service. However, in his August 2002 responses, the respondent failed to provide, among other things, a financial declaration (not produced until May 2003), monthly statements from his bank accounts and credit card accounts and complete information on his life insurance policy. See Respondent’s Answers attached to Default Judgment Memorandum as Exhibit A.

In September 2003, the petitioner served another discovery request upon the respondent to produce all test results for ISAT, sexual or psychological examinations and any tests with Dr. C.Y. Roby. See September 2003 Certificate of Delivery of Discovery. After five months the respondent had failed to respond to this discovery request. See Pleadings. Thus, in March 2004, the Guardian ad Litem filed a Motion to Compel for the same test results that the petitioner was seeking. See March 2004 Motion to Compel.

By August 2004, the respondent still had not provided any further discovery. See Pleadings. Thus, the petitioner filed a Motion to Compel production of the sexual test results and financial information (i.e., a current financial statement, all bank and credit card information



from September 2001 through June 2004 and a list of deposits and purchases). See August 19, 2004 Affidavit in Support of Motion to Compel. The respondent filed an opposition memorandum claiming he had already provided the requested discovery or the documents were not in his possession. See September 20, 2004 Response to Petitioner's Motion to Compel.

The parties came before the court in September 2004 on the petitioner's Motion to Compel. See September 21, 2004 docket entry. However, the day before the motion to compel hearing, the respondent provided documents that were partially responsive to the petitioner's first discovery request from more than two years ago. See Respondent's September 2004 Responses attached to Default Judgment Memorandum as Exhibit F. Further, the respondent also failed to produce the psychological and sexual test results as requested in September 2003. Id.

At the September 2004 motion to compel hearing, the court ordered the respondent to comply with "all [of Petitioner's] requested documents within two weeks", including the production of signed releases for "all psychosexual records as well as the other requested discovery." See September 21, 2004 Order at ¶ 3. However, the respondent provided the petitioner only one signed release for Dr. Roby. See Respondent's October 6, 2004 Second Supplemental Response to Petitioner's Request for Production of Documents attached to Default Judgment Memorandum as Exhibit H.

In October 2004, more than two weeks after the court's order, the petitioner filed a notice with the court of the respondent's refusal to sign the remaining releases, including a

release for ISAT.<sup>15</sup> See October 12, 2004 Notice to Court of Willful Refusal. Immediately thereafter, the respondent filed a notice with the court claiming he had allegedly complied with the court's order, when in reality he had only signed one release and failed to produce any other documents. See October 18, 2004 Notice to the Court of Respondent's Compliance.

In March 2005, the petitioner filed a motion on order to show cause regarding discovery issues. See March 2005 Motion in Support of Order to Show Cause. She requested that the respondent show cause why he should not be sent to jail for his failure to produce, among other things, a current financial declaration, signed releases for various financial institutions, and a list of deposits and purchases. Id. at ¶¶ 3-7.

In April 2005, at the order to show cause hearing, the court again found that the respondent "has not been forthcoming in his efforts to comply with multiple discovery requests. However, to strike his pleadings would be a last resort by the Court." See April 18, 2005 Order at ¶ 3. Also, the court again ordered the respondent to sign releases for all requested information (i.e., financial, psychosexual, etc.). Id. at ¶ 5. Further, the court "ordered Respondent to serve five (5) days in the Utah County Jail as a direct result of his continued non-compliance with discovery requests and contempt of court in this matter." Id. at ¶ 8. However, the court stayed the sentence because the county jail was near capacity "and only for that reason." Id. If the respondent failed to sign the releases within two weeks of the hearing, he was to be "ordered to serve these five (5) days in the Utah County Jail at the next hearing." Id.

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<sup>15</sup> Petitioner's Notice also indicated that she had not received a release for Dr. Roby. However, Petitioner filed her Notice on October 8 and Respondent indicates he filed his release for Dr. Roby on October 6. Thus, Petitioner had not yet received the release for Dr. Roby when she filed this notice.

The following week, the respondent filed another notice of compliance with the court. See April 28, 2005 Notice of Compliance. Further, the respondent testified at trial that in a subsequent review hearing on May 16, 2005, he indicated to the court that all the releases had been signed and discovery was complete. However, the respondent admitted at trial that he had actually withdrawn his releases from Dr. Roby on May 9, 2005, almost two weeks before the review hearing at which the respondent indicated all releases had been signed. Although the respondent claimed at trial that he withdrew his release after “everything had been gotten a hold of by lawyers”, the petitioner testified that she did not receive the documents until November 2005.

In early April 2006, the petitioner sent another discovery request, but the respondent failed to timely respond. See April 11, 2006 Certificate of Service of Discovery. In May 2006, the parties came before the court for yet another hearing on discovery. See May 15, 2006 Docket Entry.

Also in mid-May 2006, at a pretrial conference, the court ordered the respondent to respond to the petitioner’s discovery requests and trial was rescheduled for August 2006. Finally, at the end of June, the respondent responded to Petitioner’s April 2006 discovery. See Respondent’s June 2006 Responses to Petitioner’s Second Set of Interrogatories attached to Default Judgment Memorandum as Exhibit S. However, his answers to the interrogatories were incomplete and evasive. Id. For example, in response to Interrogatory No. 4, the respondent failed to identify the amounts in each account or the account numbers. Id. Also, in response to Interrogatory No. 5, the respondent did not identify a branch or account location for each

account. Id. Most significant was the respondent's refusal to answer interrogatories 8-15 because they allegedly went beyond the amount of interrogatories allowed under the Utah Rules of Civil Procedure. Id. In addition, the respondent failed to produce any documents. Id.

In mid-July 2006, the petitioner filed a motion to compel the respondent to produce the remaining discovery. See July 13, 2006 Motion to Compel. Further, because the respondent had not provided the requested discovery by the end of July 2006, the petitioner was forced to file a motion to continue the trial. See July 28, 2006 Motion to Continue Trial Date.

At the phone conference, the court agreed to continue the trial again to November 2006. See July 31, 2006 Docket Entry. Also, at a subsequent pretrial hearing on August 24, 2006, the court again ordered the respondent to produce specified documents by September 24, 2006. See August 24, 2006 Order. Further, at this hearing, Judge Taylor stated:

Now, if I authorize Mr. Weckel to withdraw, I will not, I will not change these deadlines. . . . So when you go to hire new counsel, if you go hire new counsel, you must tell them, '***I have discovery deadlines in place . . . which will not be moved unless somebody dies . . . .***'

See August 24, 2006 Audio Recording.

The parties scheduled the depositions of the respondent and his new wife for October 11. See October, 2, 2006 Notice of Deposition. However, these depositions never took place due to the respondent's failure to timely produce discovery. On October 17, 2006 the parties had another phone conference with the court. See October 17, 2006 Docket Entry. Once again the court ordered the respondent to complete discovery. Id. The respondent's deposition was rescheduled for November 6, 2006. See October 25, 2006 Notice of Deposition. However, the respondent failed to timely produce the discovery as ordered by the court. See Pleadings and

November 14, 2006 Order at ¶ 5.

Finally, on November 7, 2006 (two weeks before trial) the petitioner filed a Motion for Default Judgment because she had not yet received discovery from the respondent as ordered by the Court. See November 7, 2006 Motion for Default Judgment. This motion was ultimately denied; however, the court found that, because of the respondent's long-term failure to respond to discovery requests, a sanction of five (5) days in jail was appropriate. In her proposed memorandum decision, the petition quotes an order which can not be found in the court file; however, the court's minute entry reflects the order of jail. The respondent was given time to purge that contempt by replying to the requested discovery. His request to continue the trial, due to the late entry of his new attorney, was denied. The court finds that, through the efforts of his new attorney, the respondent substantially complied with the discovery requests by the time of trial.

Accordingly, the court makes a finding that the respondent has displayed a distinct pattern of withholding, evading and avoiding discovery and that he has repeatedly failed to comply with court orders. The petitioner requests a judgment against the respondent in the amount of \$10,000 as a sanction for his behavior. This court does not believe that a \$10,000 sanction is appropriate in this matter. However, the court believes that the respondent's intentional efforts to thwart discovery have increased the petitioner's attorney's fees substantially and will, therefore, increase her award of attorney's fees accordingly.

**B. Petitioner is Not in Contempt**

Although not clearly requested, the court infers that the respondent sought to have the

court also find the petitioner in contempt for allegedly failing to comply with discovery. It is undisputed that in early 2005, the petitioner did not produce documentation for two bank accounts. The petitioner testified that she did not produce said documents because the respondent had been using the information to interfere with her accounts. The court ordered on March 7, 2005 that neither party could use the information received pursuant to discovery to interfere with any accounts of the other party. See March 7, 2005 Order at ¶ 1. The court also ordered the petitioner to produce the requested documents within two weeks, but the court never made a finding that the petitioner was in contempt. Id. at ¶ 2.

Subsequently, the respondent testified this same issue arose on February 23, 2006. However, this was merely a pretrial conference and no motions were pending regarding the petitioner's discovery. The respondent also testified that this same issue arose in the August 24, 2006 hearing. Yet, the only motion pending for that hearing was Petitioner's Motion to Compel Respondent to produce discovery. The respondent had not filed any motions claiming the petitioner failed to comply with discovery; the judge simply ordered the petitioner sua sponte to produce the same documents that the respondent was ordered to produce.

The court does note that there were delays in this case because the petitioner changed attorneys—one change resulting in a delay of trial.

Accordingly, the court does not find the petitioner in contempt, but notes that her hands are not completely clean.

### **C. Contempt for Individual Issues**

Refer to the individual issues above for the court's finding of contempt as to each issue.

## **XVI. ATTORNEYS' FEES**

### **A. Fourth District Court Domestic Case**

Both parties requested that they be awarded attorneys' fees for this domestic matter. This court has authority to award attorneys' fees and costs "upon determining that the party substantially prevailed upon the claim or defenses." U.C.A. § 30-3-3(2). Further, an award of attorneys' fees must be based on the reasonableness of the fees requested, the financial need of the receiving spouse and the ability of the other spouse to pay." Wells v. Wells, 871 P.2d 1036, 1040 (Utah Ct. App. 1994) (citation omitted).

Has the petitioner substantially prevailed upon her claims? The court looks at the overall success of the petitioner on the important issues. The petitioner did successfully obtain imputation of the respondent's salary, but not the higher level she sought. While she was awarded somewhat less than she requested for child support, she was not at all successful in her quest for a exorbitant amount of future alimony. She wasted incredible amounts of time, energy, and attorney's fees on small issues, such as the gym equipment and the entertainment center. She was successful in her request regarding the CINTAS stock, but not regarding the Twin Labs stock. She was not awarded the \$64,000 she wanted for making the house payments, but she was awarded a substantial amount of the money she put into the repair and maintenance of the marital home. She was also rewarded some reimbursement for the home equity line of credit. She was not awarded the child-care expenses she sought. Overall, the petitioner was not successful in her presentation of many of the major issues before this court.

The court must also evaluate the reasonableness of the fees, the financial needs of the

petitioner, and the ability of the respondent to pay her fees. The court finds that the fees incurred by the petitioner are not reasonable, but are truly beyond reason for a marital estate of this size. The court is appalled at the effort that went into minor areas, such as the \$180.00 in used gym equipment and the used \$75.00 entertainment center. Some of the petitioner's requests were absurd, such as the amount requested for alimony and reimbursement for all of the house payments. The respondent should not have to pay for attorney's fees incurred in pursuing such unreasonable requests.

However, the court does consider reasonable an award of attorney's fees based upon the respondent's pattern of obstructing the discovery process. The failure of the respondent to timely and fully respond to the petitioner's discovery requests has certainly increased her attorney's fees in this matter. See the discussion on contempt.

As for the financial needs of the petitioner, she makes more money than the respondent and will be receiving monthly financial help from him. She is more than capable of paying her own attorney's fees, as is the respondent capable of paying his own fees.

#### **B. Previous Orders to Show Cause**

An award of some of the petitioner's attorneys' fees could also be independently based upon every order to show cause in which she substantially prevailed:

- In the May 2002 Order, the petitioner was awarded custody, child support, health insurance, car insurance, Novell stock, child care expenses. See May 7, 2002 Order.
- In the June 2004 Order, the petitioner was awarded reimbursement for reasonable child care expenses. See June 24, 2004 Order. Also, the respondent's request to alter alimony was denied because he had not completed psychosexual testing as previously ordered by the Court. Id.



- In the September 2004 Order, the respondent was ordered to produce requested documents within two weeks and to sign the necessary releases. See September 21, 2004 Order. The petitioner also received a judgment for unpaid child care expenses. Id.
- In the December 2004 Order, the respondent was ordered to sell the RV and his request to stay garnishment proceedings was denied. See December 2, 2004 Order.
- In the August 28, 2006 Order, the court entered a judgment against the respondent for unpaid child support, medical insurance and child care expenses. See August 28, 2006 Order. Further, the court made a finding that “Petitioner’s attorney substantially prevailed on the issues before the court.” Id. at ¶ 5.

Since the issue of attorneys’ fees was reserved for each of these matters, the court now finds that the petitioner’s general award of attorneys’ fees is also based on the petitioner’s success in each of these individual orders to show cause.

Further, the court already awarded the petitioner attorneys’ fees in the April 2005 and June 2006 Orders. See April 18, 2005 Order at ¶ 7 and June 15, 2006 Order at ¶ 4. Rather than require an individual affidavit of attorneys’ fees for each order to show cause, the court will accept a final, all-inclusive affidavit of fees incurred by the petitioner throughout this litigation.

### **C. Conclusion as to Petitioner’s Divorce Litigation Fees**

The court finds that the petitioner was not substantially successful on the issues she presented to the court, that the total bill for attorney’s fees and costs of \$83,349.61 was not reasonable, and that she makes more money than the respondent and will be receiving financial help from him on a monthly basis. On the other hand, the respondent’s efforts to avoid or delay discovery have cost the petitioner a great deal in attorney’s fees and delays. Therefore, the court finds it appropriate that the respondent should pay for 15% of the petitioner’s attorney’s fees, for a total of \$12,502.00. The court will allow the respondent to pay this amount, with the statutory

interest, over the next 10 years at the rate of \$1,250.24 per year, plus the appropriate interest.

### **C. Bankruptcy Attorneys' Fees**

Petitioner requested that a judgment enter against the respondent in this matter for attorneys' fees she has incurred in the Bankruptcy Court. In Condie v. Condie, 139 P.3d 271 (Utah Ct. App. 2006), the Court of Appeals explained that "as a general rule, attorney fees are not awardable under federal bankruptcy law [in a bankruptcy action] for enforcement of obligations contained in a divorce decree." Id. at 275. Thus, the Court of Appeals held that the trial court erred in ruling that the wife should have requested her fees in the Bankruptcy Court. Instead, the Court of Appeals' holding implied that the former wife must seek an award in state court for attorneys' fees incurred in a bankruptcy action. Id. at 276. See also In re Marriage of Wright 841 P.2d 358 (Colo. Ct. App. 1992).

Further, the Court of Appeals explained that the state trial court had authority to award bankruptcy attorneys' fees to the former wife pursuant to UTAH CODE. ANN. § 30-3-3(2), which provides that, "[i]n any action to enforce an order of . . . child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense."

In compliance with U.C.A. § 30-3-3(2), the petitioner testified that she filed an adversarial proceeding against the respondent in the bankruptcy court in order to save the marital home. Ms. Drake, the petitioner's bankruptcy attorney, also testified that the petitioner filed the adversarial proceeding to protect the marital home and to prevent the respondent from discharging his family debts to the petitioner (e.g., child support, alimony, etc.). Similar to

Condie, Ms. Drake confirmed that the petitioner will not receive an award of her bankruptcy attorneys' fees in the Bankruptcy Court.

Using the same analysis as above, this court finds that the petitioner was somewhat substantially successful on the bankruptcy-related issues of child support, but not on alimony. The issue of the marital home was not litigated before this court, while the issues of personal property were—to some small extent.

Accordingly, this court awards the petitioner her attorneys' fees incurred in the bankruptcy action at the same rate as in the divorce case proper—10%. See U.C.A. § 30-3-3(2). See also Condie, 139 P.3d at 274-76. In addition, Ms. Drake submitted an affidavit of attorneys' fees for the bankruptcy case in the amount of \$26,401.00 as of December 12, 2006. See Trial Exhibit 28. Ms. Drake testified about her experience in bankruptcy law and stated that her fees were reasonable for someone with her experience in Salt Lake County. This court finds that the bankruptcy attorneys' fees incurred by the petitioner are reasonable. The court orders the respondent to pay the sum of \$3,960.00 in attorney's fees for Ms. Drake's work in the bankruptcy matter. The court will allow the respondent to pay this amount, with the statutory interest, over the next 5 years at the rate \$792.00 per year, plus the appropriate interest.

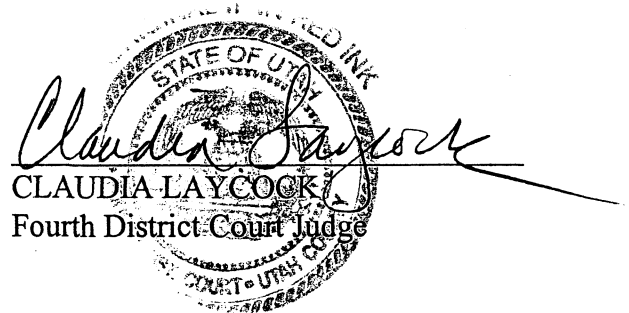
#### **D. Attorney's Fees for the Respondent**

As the respondent has not requested that the petitioner pay his attorney's fees, the court makes no corresponding order, nor does the court believe that such an order would be appropriate.

### CONCLUSION

The court believes that it has ruled upon all of the matters presented by the parties. If the court has made findings of fact in its discussions of the issues which were not presented in the Findings of Fact section of the decision, the court incorporates those findings into the Findings of Fact. The court orders the attorney for the respondent to prepare appropriate findings, conclusions, and order for the court's signature.

DATED this 29<sup>th</sup> day of May, 2007

The signature of Claudia Laycock is written in cursive over a circular court seal. The seal contains the text "STATE OF UTAH" at the top and "CLERK OF DISTRICT COURT" at the bottom. Below the seal, the text "CLAUDIA LAYCOCK" and "Fourth District Court Judge" is printed.

CLAUDIA LAYCOCK  
Fourth District Court Judge

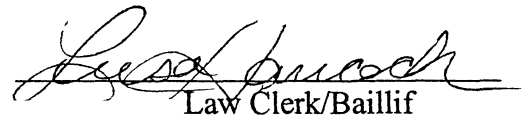
Case No. 024400765

### MAILING CERTIFICATE

I certify that a true copy of the foregoing ruling was transmitted by email on 29 May 2007 to the following:

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Tab B

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FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

2008 JUN 24 P 3: 21



**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

VALERIE J. CONNELL,	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiff,	
vs.	
HAROLD G. CONNELL,	CASE NO. 024400765
Defendants.	DATE: 29 May 2007
	Judge Claudia Laycock
	Division 3

This matter came before the Court for trial on November 22 and December 8, 19 and 20, 2006. Petitioner was present and represented by counsel, Douglas B. Thayer and Nancee Tegeder. Respondent was present and represented by counsel, Scott P. Card. Although there is also a protective order case pending (Case No. 064401019) between the parties, it is a separate matter and will not be addressed as part of this divorce case. The Court having heard evidence, having reviewed the file and the pleadings herein, now hereby enters the following Findings of Fact.

**FINDINGS OF FACT**

1. Valerie J. Connell ("the petitioner") and Harold G. Connell("the respondent") were married in November 22, 1986.
2. At the time of the marriage, petitioner had one daughter, Heather Stacey Connell,

born August 23, 1982. Respondent adopted Heather in 1990.

3. The parties also had six biological children during the course of the marriage: Meaghan Tovey Connell, born October 22, 1987; Spencer Ward Connell, born January 16, 1991; Cameron Wenger Connell, born October 17, 1993; Madison Evans Connell, born August 19, 1995; Cassidy Ford Connell, born December 23, 1997; and Caitlyn Phelps Connell, born April 8, 2000.

4. In 2001 the parties separated several times from the beginning of May through the summer. They separated on permanent basis in the beginning of Oct 2001.

5. The petitioner filed a petition for divorce on April 4, 2002.

6. Judge James R. Taylor signed an order bifurcating the proceedings and granting the petitioner a divorce on September 12, 2005.

7. On October 14, 2005--during the pendency of this divorce action--the respondent filed a bankruptcy petition in the United States Bankruptcy Court for the District of Utah ("Bankruptcy Court") (case no. 05-39070).

8. Together the parties own a home at 865 East Cascade Drive, Orem, Utah. On September 8, 2001, their monthly mortgage statement showed a balance owing of \$163,562.45, while on September 8, 2001, the balance was \$163,562.45. Shortly before the time of trial--September 11, 2006--the balance was \$151,982.91.

9. Since October 2001 the petitioner has made all of the monthly payments on the home--a total of \$64,700.00.

10. The parties purchased the home for \$175,000.00 in 1995, at which time the home had 3 finished bedrooms and 2 partially finished bedrooms.

11. During the marriage the respondent attempted to finish portions of the homes,



including putting up, taping and mudding sheetrock, adding electrical outlets, framing closets, and working on, at least, one bathroom addition. He did the work himself, but was not a licensed contractor.

12. After the respondent moved out, the petitioner added built-in shelves and hanging bars in a bedroom, finished some of the electrical work, added all new framing around the windows and trim, texturized and painted some of the walls, re-did some of the drywall, and fixed some problems in one bathroom.

13. She also installed an intercom system (\$2,413.36, May 3, 2002), installed an outdoor shed \$425.00, July 6, 2004), replaced the furnace and the water heater (\$3,519.00, November 13, 2003)), and replaced the shake roof with an asphalt-shingled roof (\$10,752.00, September 9 and 13, 2005), installing "Sola tubes" (\$433.47, October 12, 2005). She also did other types of repair and home maintenance, as found in Exhibits 3 and 4.

14. A second mortgage or line of equity credit was taken out by the parties in January 2001 for the purpose of refinancing the RV and purchasing the Twin Lab stock. By stipulation of the parties at a hearing on May 7, 2002, the parties were ordered to sell the Twin Lab stock and use the proceeds to fix the RV's transmission so that the RV could be sold, using the remainder of the proceeds to pay on the line of credit. The proceeds from the RV were to be applied to the line of credit, as well.

16. The respondent paid \$1,200 to repair the RV transmission; that sum did not come out of the stock proceeds. The RV was eventually sold for \$4,000, but the respondent gave the money to his attorney, who later gave the money to his bankruptcy trustee.

17. The respondent made the payments on the line of credit until October 2005; the petitioner has been making the payments since then. The debt balance is now approximately

\$19,000.

18. The Twin Lab stock (10,000 shares) was purchased in March 2001 by the parties at the price of \$1.3125 per share for a total, minus commissions, of \$13,425.00. Its highest value was in April 2001, when it shot up to \$2.6400 per share, for a total value of \$26,400.00. It then began its decline in value, which continued until the parties sold the stock on March 3, 2003 for a value of \$1,209.46. At the time of the May 2, 2002 hearing, the approximate value of the stock was \$7,900, while at the time the order was signed on June 10, 2002, the approximate value of the stock was \$4,400.00.

19. Although the respondent changed the password to the account, the petitioner did nothing herself—other than several phone calls—to get access to the account or to sell the stock herself.

20. At the hearing on May 7, 2002 the parties also stipulated that the Novell stock purchased at the same time as the Twin Lab stock was awarded to the petitioner as her sole and separate property and that the parties were mutually restrained from dissipating, encumbering, or hiding assets.

21. In May 2002, the respondent was ordered to maintain health insurance on the petitioner and the minor children during the pendency of this action. In October 2005, the respondent cancelled the petitioner's health insurance. The children were also not covered for a time after April 30, 2006.

22. The respondent failed to pay \$1,017.84 in health insurance premiums for August through November 2006. This court had previously entered judgments for other health insurance premiums not paid by the respondent.

23. In May 2002 the respondent was ordered to maintain car insurance on all of the

parties' vehicles. From May 5, 2006 through the time of trial, the respondent failed to pay \$85.63 in car insurance premiums.

24. In May 2002 each party was ordered to pay one-half of all unreimbursed medical and dental expenses, commencing October 23, 2001. From May 2006 through the time of trial, the respondent failed to pay the petitioner \$82.50 for one-half of unreimbursed medical expenses.

25. In May 2002 the Court temporarily awarded the respondent the GMC truck and the LaSalle trailer. During the pendency of this action, the respondent sold the GMC truck for \$3,500.00 and LaSalle trailer for approximately \$1,500.00.

26. During 2003 the petitioner's average monthly child-care cost was \$1,116.67, with the respondent's average monthly share amounting to \$558.33.

27. During 2004 the petitioner's average monthly child-care cost was \$1,601.83, with the respondent's average monthly share amounting to \$800.92.

28. During 2005 the petitioner's average monthly child-care cost was \$1,503.91, with the respondent's average monthly share amounting to \$751.95.

29. During 2006 petitioner's average monthly child-care cost was \$1,246.60, with the respondent's average monthly share amounting to \$623.30.

30. The petitioner travels for her employment approximately once per month for 3-5 days.

31. The petitioner spends approximately \$1,194.76 per month on her mortgage payments, \$84.75 on maintaining the residence, \$461.84 on food and household supplies, \$104.15 on utilities, \$207.93 on clothing, \$98.06 on medical and dental, \$1,200.96 on child care, \$314.20 on education, \$107.28 on entertainment, \$45.05 on grooming, \$136.51 on gifts, \$710.60 on donations, \$377.15 on auto expenses, \$1,900.00 on installment payments and \$87.74 on

computer expenses. She also voluntarily donates \$710.60 per month to the LDS Church.

32. The petitioner currently works full-time and makes approximately \$6,669 gross per month in income. She began her new job in November 2003.

33. At the time of the parties' separation, they were living only on the respondent's income.

34. The respondent worked for the LDS Church from approximately June 2001 through October 2003. When he stopped working for the LDS church, he was earning approximately \$2,574.00 gross per two-week pay period, or \$5,577.00 gross per month (\$66,924.00 per year).

35. The respondent worked for BYU from October 2003 through February 17, 2006. Before the respondent was terminated from his position at BYU, he grossed approximately \$5,996.00 gross per month (\$71,952.00 per year). See Trial Exhibit 23 at p.5.

36. The respondent voluntarily resigned from BYU, because he failed to maintain an LDS temple recommend as required for employment. He lost his temple recommend because he was excommunicated.

37. The respondent began his current employment with Medicity in May 2006, where he earns \$5,000.00 gross per month (\$60,000.00 per year).

38. The respondent married Brenda Louise Bruni in October 2005.

39. The respondent pays his second wife's monthly house payment of \$752.00. He also pays her \$1,500.00 per month to help with living expenses.

40. Ms. Bruni's daughter, Sarah, has always lived with them. Her 18<sup>th</sup> birthday was in April, 2006, at which time Ms. Bruni's child support for Sarah ended. Sarah pays her mother \$360.00 per month (and sometimes less) to help with expenses.

41. Ms. Bruni's older daughter and infant child also lived with them from February

through April 2006, as did Ms. Bruni's mother from January or February 2006. Her mother has helped her financially at times. Her mother has terminal cancer.

42. In 1997 the petitioner received a gift of CINTAS stock from her uncle; she placed the CINTAS stock in a private and separate account.

43. The respondent accused her, during a session of marriage counseling, of not being a "team player"--due to the separate CINTAS stock account. Because of that accusation, she felt coerced to place the CINTAS stock into a joint account in January 2001.

44. The respondent's name did not appear on the account's monthly statements until April 2001; however, the respondent had access to the account as early as January 2001.

45. In April 2001 the respondent borrowed against the CINTAS stock to purchase other stock without the petitioner's permission.

46. Subsequently, on July 19, 2001 the respondent sold the CINTAS stock for \$31,784.98. However, the parties only received approximately \$18,000 in cash, as the remaining amounts had been used by the respondent to purchase other stocks.

47. At approximately the same time the parties separated, the respondent took out a \$1,900.00 quick draw loan. The petitioner never saw this money, but she ultimately paid this loan back.

#### **I. BANKRUPTCY ISSUES RELATED TO THIS DIVORCE ACTION**

48. On October 14, 2005, the respondent filed a bankruptcy petition in the United States Bankruptcy Court for the District of Utah ("Bankruptcy Court") (Case No. 05-39070). The petitioner's claims for alimony, support and/or maintenance will receive a priority payment

as part of distribution of the estate in the bankruptcy case.<sup>1</sup> Under Utah case law, said claims may also include attorneys' fees spent in pursuit of payment for alimony, support, maintenance, custody and/or visitation.<sup>2</sup>

49. Therefore, the petitioner is seeking to have this court categorize as many as possible as pre-bankruptcy-petition-filing judgments and as an award for alimony, support or maintenance (or fees incurred in obtaining these judgments) in order to protect her claims in Bankruptcy Court.

50. Further, the Bankruptcy Court will not consider any claims against the respondent that were incurred after his bankruptcy petition was filed, i.e., child support arrearages arising after October 2005. The Bankruptcy Court will only deal with claims against the respondent that arose prior to the respondent's filing of his bankruptcy petition.

## **II. BIFURCATION OF THE DIVORCE AND DATE OF THE DECREE**

51. On April 28, 2005, Respondent filed a Motion to Bifurcate Divorce and an Affidavit in Support. On May 16, 2005, Commissioner Patton denied Respondent's Motion to Bifurcate. On September 1, 2005, Respondent filed a Motion to Reconsider Ruling for Bifurcated Divorce. However, as so many attorneys do, the respondent simultaneously submitted a proposed Bifurcated Divorce Decree. Judge James R. Taylor inadvertently signed the Bifurcated Divorce Decree on September 12, 2005.

52. Subsequently, on October 7, 2005, the parties came before Judge Taylor, who

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<sup>1</sup> As of the morning of the first day of trial, the bankruptcy court retained jurisdiction over the marital home only, leaving all personal property issues and other debt issues to this court. Therefore, this court makes no decision regarding the disposition of the parties' equity in the marital home.

<sup>2</sup>See *Seals v. Condie*, 139 P.3d 271, 277 (Utah App. 2006) ("Those determinations 'rest[] primarily in the sound discretion of the trial court.'" Cites omitted.).

heard arguments and granted the respondent's motion to reconsider the commissioner's ruling. Later in the hearing, Judge Taylor discovered the signed Bifurcated Divorce Decree in the file; he then reprimanded the respondent's attorney for filing a motion to reconsider, instead of an objection to the commissioner's ruling. Nevertheless, he left his decision in place and granted the motion to reconsider. He did not order either party to prepare a new order of bifurcation, as neither attorney brought up that particular subject. There was absolutely no discussion between the attorneys and the court regarding a change of date for the decree.

53. This court can now only assume that Judge Taylor was content to leave the previously signed order in place. Therefore, this court will not amend the date nunc pro tunc (as requested by the petitioner), but will leave the date of divorce as September 12, 2005.

### **III. CUSTODY AND VISITATION**

54. Pursuant to an Order and Stipulation entered on July 28, 2006, the respondent shall not exercise or attempt to exercise visitation with the minor children unless the visitation time is supervised by a third party professional visitation supervisor such as ACAFS or WillWin. Due to the prior sexual abuse issues involving the respondent and the children, the respondent has permanently waived his right to have unsupervised visitation. Thus, the petitioner is awarded sole legal and physical custody of the minor children.

55. Further, while the respondent may attend public functions in which the minor children are involved, such as plays or sporting events, he is not allowed to visit with the children before, during or after the events. Also, the respondent may not attend the church where the children are attending.

56. The only remaining issue at trial regarding visitation concerned telephonic visitation. Pursuant to the petitioner's testimony, the parties had previously agreed to the

Guardian ad Litem's recommendation that the respondent be allowed to call the children between 5:00 p.m. and 8:00 p.m. on Tuesdays and Thursdays. The respondent did not dispute these times for telephonic visitation, nor did he dispute that he had previously agreed to these times. Further, the Guardian ad Litem recommended that the children should be allowed to call the respondent whenever they want. Neither party disputed this recommendation. In fact, when questioned at trial, the respondent agreed with the recommendation.

57. Accordingly, the respondent's telephonic visitation shall be set on Tuesdays and Thursdays between 5:00 p.m. and 8:00 p.m. or whenever the children want to call the respondent.

#### **IV. MARITAL HOME**

58. Due to the respondent's pending bankruptcy, this court does not have jurisdiction to award either party equity in the marital home. Petitioner urges this court to make a finding that mortgage payments and home improvement expenses she has paid constitute family support and/or maintenance, because it was necessary to provide a habitable home for the children. Further, she urges the court to enter a judgment against the respondent for the amount that the petitioner spent on the mortgage and improvements.

##### **A. First Mortgage**

59. Petitioner has lived in the family home with the children and has made the payments on the first mortgage since the parties separated in October 2001. In addition, in May 2002 the court ordered the petitioner to make the first mortgage payments. See May 2002 Order at ¶ 7. On September 8, 2001, the debt on the marital home was \$163,562.45. See Trial Exhibit 1. On December 29, 2001 the debt on the marital home was \$162,837.44. Id. Shortly before the time of trial--September 11, 2006--the debt on the marital home was \$151,982.91. Id. Thus, in construing these numbers in a light most favorable to the respondent, the petitioner has paid



approximately \$10,855 in principal since the parties separated ( $\$162,837 - \$151,982 = \$10,855$ ).

60. Further, the petitioner testified that she has spent approximately \$64,700 on principal and interest payments from the time the parties separated until the time of trial. Thus, Petitioner has spent approximately \$53,145 on interest payments for this time period ( $\$64,700 - \$10,855 = \$53,845$ ).

61. Since this court cannot award her any equity in the marital home, the petitioner requests that this court enter a judgment against the respondent for the \$64,700.00 she has spent on principal and interest payments for the first mortgage since October 2001. Moreover, the petitioner requested that this court characterize said judgment as family support and/or maintenance since providing a home for the children is part of supporting or maintaining the family. The respondent did not dispute that the petitioner made such payments.

62. This court agrees with the respondent that the petitioner's argument is without merit. The petitioner has received the benefit and comfort of living in the home and should not be granted judgment against the respondent for having made the payments on the home. To grant her a judgment for the \$64,700 that she paid toward the mortgage would be the equivalent of granting her—or the respondent, for that matter, were the tables turned—credit and a judgment for paying rent, utilities, phone bills, light bulbs, toilet paper, and all other household necessities. Although all of those bills and items could be characterized as family support and/or maintenance (since the children need the benefit of all of those bills and items), the court cannot find any legal precedent for such a ruling.

63. In addition, she received (or should have received) support in the way of alimony and child support. She will receive a judgment for any such support not paid by the respondent during the pendency of this action. To grant her a judgment for unpaid alimony and child

support, plus her mortgage payments, would, in effect, grant her judgment twice and force the respondent to pay twice. Such a ruling would be outside the bounds of equity.

64. The division of the marital home and any award of equity remains in the domain of the bankruptcy case. This court will not attempt to make any ruling in that regard, other than to note, again, that the petitioner has reduced the principal of the first mortgage by \$10,855.00 since the separation of the parties. No evidence was produced which would enable the court to calculate the reduction of the principal since the time of the bifurcated decree of divorce.

### **B. Home Improvement**

65. During the marriage the respondent attempted to finish portions of the home, including putting up, taping and mudding sheet rock, adding electrical outlets, framing closets, and working on, at least, one bathroom addition. He did the work himself, but was not a licensed contractor. The parties were, apparently, satisfied to let him attempt these improvements while they were married.

66. After the respondent moved out, the petitioner added built-in shelves and hanging bars in a bedroom, finished some of the electrical work, added all new framing around the windows and trim, texturized and painted some of the walls, re-did some of the drywall, and fixed some problems in one bathroom.

67. She also installed an intercom system (\$2,413.36, May 3, 2002), installed an outdoor shed \$425.00, July 6, 2004), replaced the furnace and the water heater (\$3,519.00, November 13, 2003)), and replaced the shake roof with an asphalt-shingled roof (\$10,752.00, September 9 and 13, 2005), installing "Sola tubes" (\$433.47, October 12, 2005). She also did other types of repair and home maintenance, as found in Exhibits 3 and 4.

68. The petitioner claims that the respondent should pay the amount of \$21,885.33 for

the work that she did or had done. See Trial Exhibits 3 and 4. However, this court does not believe that (1) the respondent should pay for all of the appropriate costs, but that the petitioner should share in the cost; and (2) that the respondent should pay for improvements and maintenance costs that were optional.

69. The court finds that the roof replacement (\$10,752.00) and the furnace and water heater replacements (\$3,519.00) were necessary and appropriate, as well as the garage door opener (\$298.00). However, the installation of an intercom system (\$2,413.36) was not necessary and the respondent should not have to share in that cost. Id. There were many items and costs in Exhibit 4 which were unexplained or appeared to be for minor repairs. This court views the normal, ongoing maintenance and repairs as part of the burden born by the party who has the benefit of living in the home, pending the conclusion of the divorce action.

70. Therefore, this court is not persuaded that the respondent should have to bear all of the costs, as outlined in Exhibit 4, nor should he have to pay for costs beyond those larger-ticket items which improved the value of the home.

71. Therefore, the parties shall share equally the following costs: roof replacement, \$10,752.00; furnace and water heater, \$3,519.00; and garage door opener, \$298.00. The court notes that the petitioner paid for the roof replacement on or about September 20, 2005, which was when the petitioner paid the balance of the roofing cost. She paid for the furnace and water heater on November 13, 2003, two years before the decree was signed. She paid for the new garage door opener on January 6, 2004. All of these costs were incurred before the filing of the bankruptcy action.

72. The total amount to be shared by the parties is \$14,569.00. Each party will pay one-half or \$7,284.50. The respondent is ordered to pay a judgment in the amount of \$7,284.50

to petitioner for his share of the improvements to the home. For the purposes of the bankruptcy proceeding, this court characterizes this judgment as family support and maintenance, because improvement and maintenance expenses were necessary to provide the children with a habitable home. All of the \$7,284.50 was incurred before the filing of the bankruptcy action.

### **C. Home Equity Line of Credit/Second Mortgage**

73. A line of credit secured by a mortgage on the marital home was taken out by the parties in January 2001 for the purpose of refinancing the RV and purchasing the Twin Lab stock. By stipulation of the parties at a hearing on May 7, 2002, the parties were ordered to sell the Twin Lab stock and use the proceeds to fix the RV's transmission so that the RV could be sold, using the remainder of the proceeds to pay on the line of credit. The proceeds from the RV were to be applied to the line of credit, as well.

74. The respondent paid \$1,200 to repair the RV transmission; that sum did not come out of the stock proceeds. The RV was eventually sold for \$4,000. In an order signed on January 5, 2005 (from a December 2, 2004 hearing), the Court ordered the proceeds from the RV sale to be placed with the respondent's former attorney, James Faust, to hold in trust "until such time as the Court makes additional orders, or the parties stipulate in writing to a dispersal of the funds."

75. At the October 7, 2005 hearing before Judge Taylor, the parties stipulated that the RV proceeds should be applied to the line of credit. The respondent was present, according to the court's minute entry. However, the respondent gave the \$4,000 to his attorney, James Faust, then retrieved the money, and then gave the money to his new attorney, Theodore Weckel. The court has no evidence before it that the respondent gave his new attorney any instructions regarding the disposition of the money. Mr. Weckel gave the \$4,000 to the bankruptcy trustee. The court does not find the respondent in contempt for the transfer of the \$4,000 to the

bankruptcy trustee, although the court finds that the respondent should pay an extra \$2,800 toward the balance owing on the line of credit (\$4,000 minus the \$1,200 to fix the RV).

76. The respondent made the payments on the line of credit until October 2005; the petitioner has been making the payments since then. The debt balance is now approximately \$19,000.

77. The Twin Lab stock (10,000 shares) was purchased in March 2001 by the parties at the price of \$1.3125 per share for a total, minus commissions, of \$13,425.00. Its highest value was in April 2001, when it shot up to \$2.6400 per share, for a total value of \$26,400.00. It then began its decline in value, which continued until the parties sold the stock on March 3, 2003 for a value of \$1,209.46 and applied the proceeds to the line of credit. At the time of the May 2, 2002 hearing, the approximate value of the stock was \$7,900, while at the time the order was signed on June 10, 2002, the approximate value of the stock was \$4,400.00.

78. Although the respondent changed the password to the account, the petitioner did nothing herself—other than several phone calls—to get access to the account or to sell the stock herself. Both parties had the power to sell the stock, while neither party had the power to control the stock market and the value of the stock. Although the stock's value declined from May 2001 to the time of the May 2002 hearing, neither party sold the stock while its value remained higher than the original purchase price. By the time of the May 2002 hearing, the stock was already worth less than the parties had paid for it. Unfortunately, neither party possessed the prophetic powers necessary to out-guess the stock market, and neither party moved to sell the stock at an advantageous moment. The court holds neither party responsible for the low value of the stock when it was finally sold and awards neither party a judgment on this issue.

79. Therefore, the court divides the remaining balance on the line of equity equally

between the parties (\$9,500 each), but orders the respondent to pay an extra \$2,800 for the proceeds of the RV which were not paid toward the line of credit. The court orders the respondent to pay a judgment in the amount of \$12,300.00 for his share of the remaining balance on the line of credit.

80. The court rejects a finding of contempt against the respondent with regard to either the Twin Lab stock or the RV proceeds. All of the \$12,300.00 judgment was incurred before the filing of the bankruptcy action.

## **V. HEALTH INSURANCE**

### **A. Respondent's Failure to Maintain Health Insurance**

81. In May 2002, Respondent was ordered to maintain health insurance on the petitioner and the minor children during the pendency of this action. See May 2002 Order at ¶ 4. However, in October 2005, the respondent cancelled the petitioner's health insurance. See Trial Exhibit 6.

82. The court already found that the petitioner made a prima facie case for contempt regarding the respondent's failure to maintain health insurance for the petitioner as ordered by the court. See Petitioner's May 2006 Order to Show Cause and Order on May 2006 hearing. Respondent reserved his right to argue at trial "that he should not be held in contempt, notwithstanding Petitioner making her prima facie case." Id.

83. Although the respondent testified at trial that he cancelled the petitioner's health insurance because he was planning to remarry, the Order states he was required to maintain her health insurance "during the pendency of this action"--not until he remarried. The respondent further testified that he was not aware of any changes to this Order. Thus, the respondent failed to meet his burden of showing why he should not be held in contempt for failing to maintain the

petitioner's health insurance.

84. In addition, it is undisputed that the respondent lost insurance for the children on April 30, 2006. See also Trial Exhibit 6. The petitioner requested that the respondent be found in contempt for failing to maintain insurance on the children as ordered by the court. The respondent did not provide any evidence that he provided the children with new insurance immediately following the loss of coverage on April 30, 2006. In fact, the respondent admitted that he did not inform the petitioner about her COBRA options for the children when he learned about them in February.

85. Accordingly, the court finds the respondent in contempt for failing to maintain health insurance on the petitioner and the children. The petitioner is awarded her attorneys' fees and costs incurred in obtaining this finding. Further, this court makes a finding that maintaining health insurance is necessary for family support and maintenance in order to keep the children in good health.

#### **B. Respondent's Failure to Pay Health Insurance Premiums**

86. Respondent was ordered to pay all costs of premiums associated with health insurance. See May 2002 Order at ¶ 4. The petitioner testified that she obtained health insurance once she learned that the respondent had failed to maintain said insurance, yet the respondent failed to pay anything toward these premiums. On June 16, 2006, the court ordered the respondent to pay \$1050.73 in medical insurance premiums owed as of May 5, 2006.<sup>3</sup> See June 16, 2006 Order at ¶ 1. In addition, on August 28, 2006, the court ordered the respondent to pay

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<sup>3</sup>The respondent objected to the commissioner's ruling, but the objection was overruled by Judge Taylor.

health insurance premiums for June and July 2006, which totaled \$509.00.<sup>4</sup> See August 28, 2006 Order at ¶ 2. See also Trial Exhibit 5.

87. At trial, the petitioner testified that respondent owed her an additional \$1,017.84 in health insurance premiums for August through November 2006. Petitioner requested that the court enter a judgment against respondent for this amount. The respondent failed to provide any evidence that he had been paying insurance premiums to the petitioner.

88. Further, the petitioner requested that the respondent be found in contempt for his failure to pay any medical insurance premiums since insurance was cancelled for the petitioner and the children. Again, the respondent failed to provide any evidence that he had been paying insurance premiums during this time period.

89. Accordingly, a judgment will enter against the respondent for \$1,017.84 for unpaid health insurance premiums. In addition, the court finds the respondent in contempt for failing to pay insurance premiums after the petitioner's and the children's insurance was cancelled. Further, these judgments and any fees incurred in obtaining these judgments will be characterized as family support and/or maintenance, because health insurance premiums are necessary to keep the children in good health. Moreover, the petitioner is award her attorneys' fees and costs incurred in obtaining these judgments.

### **C. Future Health Insurance**

90. The petitioner testified that she would like to be the primary insurer for the children because of the difficulties she has faced in obtaining insurance coverage information from the respondent. The petitioner also requested that the respondent be required to pay one-half of the children's health insurance premiums under her plan. The court finds that these are

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<sup>4</sup>The court can find no objection in the file to this ruling.



reasonable requests, as the respondent has failed in the past to insure the children and to notify the petitioner when coverage ceased. It will be more beneficial to the children for the petitioner to be in charge of the insurance coverage and their health care. The court orders that the petitioner's insurance will be the primary coverage for the children and that the respondent will pay one-half of the cost.

91. If the respondent can obtain a secondary health insurance, which would, in effect, cover all health costs for the children which are not covered by the petitioner's insurance, the petitioner will pay for one-half of the cost of such insurance. Otherwise, the parties will simply pay one-half each of all uncovered health care costs for the children.

## **VI. CAR INSURANCE**

### **A. Respondent's Failure to Maintain Car Insurance**

92. In May 2002, the respondent was ordered to maintain car insurance on all of the parties' vehicles. See May 2002 Order at ¶ 5. The respondent testified that he was not aware of any changes to this Order. However, the petitioner testified that beginning in February 2005 the respondent failed to make full car insurance premium payments. Thus, on June 16, 2006, the Court ordered the respondent to pay \$1,063.11 in car insurance premiums owed as of May 5, 2006. See June 16, 2006 Order at ¶ 1.

93. From the time of this judgment until the time of trial, the respondent failed to pay \$85.63 in car insurance premiums. The respondent failed to provide any evidence to demonstrate that the Order to maintain car insurance had changed or that he had, indeed, made all the necessary payments. In addition, the court finds no reason to modify the previous order.

94. Accordingly, the petitioner is granted a judgment against the respondent in the amount of \$85.63 for car insurance premiums. The court also finds that car insurance premiums

are necessary for the support and/or maintenance of the family to allow them to get around and live their lives. Further, pursuant to the petitioner's request, the court finds the respondent in contempt for failing to obey this court order regarding car insurance. The court awards the petitioner her attorneys' fees and costs incurred in obtaining this judgment.

#### **B. Future Car Insurance**

95. The petitioners requests that the court order the respondent to pay for one-half of any future car insurance premiums for the children. The court agrees with the respondent that driving is a privilege and that such support is not mandatory for minors. This request is denied.

### **VII. MEDICAL EXPENSES**

#### **A. Respondent's Failure to Pay Medical Expenses**

96. In May 2002, each party was ordered to pay one-half of all unreimbursed medical and dental expenses, commencing October 23, 2001. See May 2002 Order at ¶ 4. The respondent testified that to his knowledge this Order has not been changed. In September 2004, the petitioner was awarded judgment against the respondent in the amount of \$231.00 for his share of medical costs. See September 2004 Order at ¶ 4. In addition, on June 16, 2006, the court ordered the respondent to pay \$1,589.60 for his share of medical expenses as of May 5, 2006. See June 16, 2006 Order at ¶ 1. The court found the petitioner made a prima facie case for the respondent's contempt in failing to pay medical expenses for 2003 through 2005. See May 2006 Order at ¶ 5.

97. Also, the petitioner testified that currently the respondent owes her \$82.50 for one-half of unreimbursed medical expenses from May 2006 to the time of trial. The respondent failed to provide any evidence that he did not owe this amount or that he had paid this amount. Petitioner requested the Court to find the respondent in contempt for failing to pay medical

expenses in 2006.

98. Accordingly, a judgment shall enter against the respondent in the amount of \$82.50 for unreimbursed medical expenses and the court finds him in contempt for failing to pay such. Further, all judgments awarded to the petitioner in this case regarding unreimbursed medical expenses, including attorneys' fees and costs incurred in obtaining these judgments, shall be classified as family support and/or maintenance because such expenses are necessary for the children's health. Moreover, the petitioner is awarded her attorneys' fees and costs incurred in obtaining these judgments. Also, since the September 2004 order entered before the respondent filed for bankruptcy, the \$231.00 shall be classified as a pre-bankruptcy petition claim. In addition, \$1,197.18 of the June 2006 judgment shall be classified as a pre-bankruptcy petition claim.

#### **B. Future Medical Expenses**

99. If the respondent obtains secondary insurance, which would in effect, cover all health costs for the children which are not covered by the petitioner's insurance, the petitioner will pay for one-half of the cost of such insurance. Otherwise, each party shall be responsible for one-half of all future unreimbursed medical and dental expenses reasonably incurred by the minor children, including co-pays, deductibles and prescriptions. which are not paid by a medical insurance carrier.

100. If the respondent does obtain secondary insurance, the respondent must pay his share of the bills within 30 days after the secondary insurance rejects any costs. If the respondent chooses not to obtain secondary insurance, then the parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment. Within 30 days of receiving written verification of medical expense,

the parent receiving verification shall pay one-half of the medical expense.

### **VIII. PERSONAL PROPERTY**

101. On May 7, 2002, the court temporarily awarded the respondent the Subaru, GMC truck and LaSalle trailer. See May 2002 Order at ¶ 10. The respondent testified that he understood this court order and that he was not aware of any changes to this order. Nonetheless, the respondent admitted that he sold the GMC truck and LaSalle trailer in violation of this Court order. The respondent sold the GMC truck for approximately \$3,500.00 and the LaSalle trailer for approximately \$1,500.00.

102. The court awards the petitioner a \$2,500.00 judgment against the respondent in the amount of one-half of the proceeds from the sale of the truck and trailer. Further, the petitioner had already established a prima facie case of the respondent's contempt for disposing of marital assets. Respondent failed to provide any evidence that the May 2002 order had been modified or should have been modified. Thus, this court finds the respondent in contempt for selling these items of marital personal property. Moreover, the petitioner is awarded her attorneys' fees and costs incurred in obtaining this judgment.

#### **B. Exercise Equipment and Entertainment Center**

103. In May 2002 the court temporarily awarded the respondent some exercise equipment and an entertainment center that were marital property. During the petitioner's testimony regarding these items, the court received the impression that these items were of great value, although the petitioner offered no evidence as to their value. Much to the court's surprise, the only evidence as to value came from the respondent, who testified that he purchased the used exercise equipment at an auction through Alpine School District at \$20.00 per item for a total of \$180.00. It would have been worth even less than that at the time the parties separated. His

testimony was that the entertainment center was worth \$75.00.

104. The court is stunned at the time, effort, and attorney's fees that the petitioner expended in arguing this issue. These items were not worth an hour's time in attorney's fees. The court does not find the defendant in contempt for leaving the exercise equipment in Montana or giving the cheap entertainment center to his new wife. The court will not award attorney's fees for this issue.

#### **D. Remaining Marital Personal Property**

105. At the beginning of this trial, the Bankruptcy Court retained jurisdiction over the parties' personal property. However, on the third day of trial, December 19, 2006, the trustee in the respondent's bankruptcy case abandoned all of the personal property. See Trial Exhibit 27. Thus, this court obtained jurisdiction over the remaining marital personal property.

106. Despite petitioner's testimony that the respondent has had multiple opportunities to go through the home and take whatever property he wanted, the court finds that, given the incredible acrimony between these parties and the existence of a protective order which prevents the respondent from going near the marital home, the respondent was wise in waiting for trial to request the return of just a few items.

107. Therefore, the court orders the petitioner to return the following items to the respondent: a punching bag, a DeWalt compound miter saw, a DeWalt router, a Milwaukee Sawzall, an electric planer, a 24-foot ladder, and the sewing machines which were gifts from his grandmother. The attorneys for the parties can aid in transferring these items from one party to the other.

### **IX. CHILD CARE EXPENSES**

#### **A. Respondent's Failure to Pay Child-Care Expenses**

108. In May 2002, each party was ordered to pay one-half of any work-related daycare expenses for the children. See May 2002 Order at ¶ 14. In September 2004, the petitioner was awarded judgment against the respondent for his one-half share of daycare expenses, including \$4,560.00 for the year 2003 and \$3,030.00 for January 1, 2004 through August 31, 2004. See September 2004 Order at ¶¶ 5-6. In addition, on August 28, 2006, the court ordered the respondent to pay \$1,000.00 in child-care costs for the months of June and July 2006. See August 28, 2006 Order at ¶ 2. Of course, these judgments still stand, minus the garnishments of \$8,425.39 already taken by the petitioner.

109. In September 2004 the respondent was ordered to pay \$340.00 per month during the school year and \$500.00 per month during the summer months, for a total amount of \$4,560.00 per year.<sup>5</sup> Commencing with September 2004 and ending November 22, 2006 (the first day of trial), the respondent owed \$1,360.00 for 2004; \$4,560.00 for 2005; and \$4,136.00 for 2006 for a total owing of \$10,056.00. Judgment has already been given to the petitioner for June and July 2006 for \$1,000.00, leaving a total of \$9,056.00 for the court's calculations.

110. According to Exhibit 16, from October 2004 through November 22, 2006 the respondent paid \$7,280.00 (as well as other arrearages through garnishments).

#### **B. Judgment and Contempt**

111. The court grants judgment to the petitioner for the amount of \$1,776.00 in unpaid child-care expenses, pursuant to the September 2004 order of \$340.00 and \$500.00, for the months and years listed above. The court finds the respondent in contempt for his failure to pay the \$1,776.00 pursuant to the September 2004 order and awards petitioner her reasonable attorney's fees for this issue.

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<sup>5</sup>At that time both parties reserved the right to argue as to the reasonableness of that order.

112. This judgment<sup>6</sup> for child-care expenses and attorneys fees incurred in obtaining judgments for child-care expenses shall be classified as family support and/or maintenance, because it directly relates to taking care of the children. Also, pursuant to the petitioner's testimony and Exhibit 16, \$978.00 of this judgment shall be classified as a pre-bankruptcy petition judgment—the total due from September through December 2004 of \$1,360.00, plus January through October 14, 2005 of \$3,710.00, minus the amount the respondent paid during this time period (\$1,020, plus \$3,072 for a total of \$4,092.00.<sup>7</sup>

**C. Petitioner's Request for Increased Child-Care Expenses, Past and Future**

113. The court has looked at the petitioner's testimony and Exhibit 16 very carefully and makes the following observations:

- a. During 2003 the petitioner's average monthly child-care cost was \$1,116.67, with the respondent's share amounting to \$558.33.
- b. During 2004 the petitioner's average monthly child-care cost was \$1,601.83, with the respondent's share amounting to \$800.92.
- c. During 2005 the petitioner's average monthly child-care cost was \$1,503.91,

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<sup>6</sup>In the petitioner's suggested memorandum decision, her calculations included her figures for the larger amount she seeks for child-care expenses, as well as the past judgments and past garnishments. The court will not attempt to run those calculations at this time, as those judgments and garnishments were not truly before the court at trial. However, for purposes of the bankruptcy action, the court will find that all judgments awarded to the petitioner for amounts incurred before October 14, 2005 should be considered pre-bankruptcy in nature and should also be classified as family support and/or maintenance.

<sup>7</sup>Exhibit 16 failed to provide monthly amounts paid by the respondent, so the court has assumed some logical facts in order to bring finality to this issue. The court has arrived at the September through December 2004 credits for the respondent by noting that the \$1,020 paid in 2004 is exactly 3 months at \$340.00. Apparently, the respondent finally made some payments after Commissioner Patton lowered the amounts. As for 2005, the court simply took the annual total of \$4,560.00, divided it by 12, and multiplied that result by 9.5 months.

with the respondent's share amounting to \$751.95.

d. During 2006 petitioner's average monthly child-care cost was \$1,246.60, with the respondent's share amounting to \$623.30.

e. The petitioner urges the court to award her an ongoing child-care amount of \$400 per week (\$20,000 per year/\$1,666.67 per month/\$833.34 respondent's share)<sup>8</sup> for "nanny" care, which she deems necessary, because she travels approximately once per month for 3-5 business days.

f. The petitioner now works at a job which brings her approximately \$80,000.00 annual salary, which is more than the respondent now makes.

114. The parties' minor children are now 16, 13, 12, 9 and 7 years of age; the two older children are 19 and 24 years of age.<sup>9</sup> The petitioner's argument is that, because of her occasional travel for work, the respondent should help her pay for full-time nanny care. The court finds this unreasonable. All of the children are in school full-time, so there is no need for full-time care during the school year, and only two of the children are still in elementary school. The older children certainly can be expected to help with the younger children; indeed, the oldest boy does not have football practice after school year-round. The infrequency of the petitioner's work-related travel does not justify the request that the respondent pay \$833.34 per month for his share of the child-care expenses. Although the petitioner is correct in asserting that the respondent offered no other reasonable suggested costs for child-care expenses, neither did the petitioner.

115. Therefore, the court finds that the amounts previously ordered are within the

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<sup>8</sup>The court calculated this with a 50-week work year.

<sup>9</sup>As of the time of this decision—not the time of trial.



realm of reason and also within this court's experience on the bench. The court will order the respondent to pay ongoing child-care expenses of \$340.00 per month during the nine months of the school year and \$500.00 per month during the three months of the summer vacation, for a total of \$4,560.00 per year. With the petitioner paying equal amounts, this should be quite adequate for the children's needs.

## **X. ALIMONY**

### **A. Respondent's Failure to Pay Two Months' Alimony**

116. The respondent was ordered to pay \$230 per month in alimony, beginning April 1, 2002. See May 2002 Order at ¶ 3. At a hearing on May 15, 2006 the parties stipulated that the petitioner made a prima facie case on her order to show cause regarding alimony payments for March and April 2006. See Order and Stipulation signed July 28, 2006 at ¶ 5.

117. At a hearing on June 15, 2006, the respondent failed to present any evidence that he paid these amounts or that he was justified in failing to pay these amounts. Thus, the court makes a finding that the respondent was in contempt for failing to pay two months of alimony payments. On June 15, 2006, the court ordered the respondent to pay \$460.00 in alimony arrearages incurred as of April 13, 2006. See Order signed July 28, 2006 at ¶ 1. The court awards the petitioner her attorneys' fees and costs incurred in obtaining these judgments.

118. As of the time of trial, the respondent was current on his alimony obligations.

119. The court file is replete with the respondent's early efforts to reduce the temporary alimony obligation of \$230.00 per month. He filed 3 verified motions to have his support orders reduced or adjusted. These motions were finally heard at a hearing on June 24, 2004, at which Commissioner Patton took care of some issues including child support, but reserved all other matters for trial, including alimony. Therefore, the court finds that the

respondent did properly preserve his right to argue for retroactive adjustment (and possible credit) of alimony as of August 6, 2003, which is when the second motion (which mentioned alimony specifically) was filed with the court. Petitioner reserved the same right in May 2002. The court will make any adjustments for retroactivity after determining the correct income to be attributed to the parties.

### **B. Past and Future Alimony**

120. The petitioner requests that the respondent be ordered to pay future alimony, while the respondent requests that his alimony obligations cease. He has withdrawn his request for alimony from the petitioner. In determining whether to award alimony, the court considers:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support . . .
- (b) The court may consider the fault of the parties in determining alimony.

U.C.A. § 30-3-5(8).

#### **1. The Financial Condition and Needs of Petitioner**

121. The petitioner spends approximately \$1,194.76 per month on her mortgage payments, \$84.75 on maintaining the residence, \$461.84 on food and household supplies, \$104.15 on utilities, \$207.93 on clothing, \$98.06 on medical and dental, \$1,200.96 on child care, \$314.20 on education, \$107.28 on entertainment, \$45.05 on grooming, \$136.51 on gifts, \$710.60 on donations, \$377.15 on auto expenses, \$1,900.00 on installment payments and \$87.74 on computer expenses. See also Trial Exhibit 9.

122. Petitioner also testified that her current net monthly gross income is \$6,669.08. The court notes, with some surprise, that the petitioner declares no exemptions and, thereby,

increases the amount of taxes taken from her gross income. Therefore, her net income is an artificially low \$4,121.30. Id. She also voluntarily donates \$710.60 per month to the LDS Church. Therefore, without the inclusion of the church donation, the alimony and child support she is currently receiving, minus deductions and expenses as outlined above, the petitioner is deficient approximately \$2,548.75 per month. Id.

## **2. The Recipient's Earning Capacity or Ability to Produce Income**

123. The petitioner is currently working full-time and makes approximately \$6,669 gross per month in income. Id. The respondent did not provide any evidence that the petitioner is working below her earning capacity or that she is able to produce more income. Thus, the court finds that the petitioner is able to earn \$6,669 gross per month. At the time of the parties' separation, they were living only on the respondent's income. She began her new job in November 2003.

## **3. The Ability of Respondent to Provide Support**

124. Respondent worked at Novell from August 1998 through approximately June 2001. From January 2001 through about June 15, 2001 he grossed \$47,879.77. See Trial Exhibit 18. Thus, in construing this amount in a light most favorable to the respondent, he grossed approximately \$7,979 per month (\$47,879 for 6 months) while working at Novell.

125. The court finds credible the respondent's testimony that he voluntarily left this employment at Novell for a lower paying job, because he was afraid he would be laid off before finding another job.<sup>10</sup> The court is persuaded by the respondent's argument that the computer industry is volatile with regard to steady employment and that it was reasonable for the

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<sup>10</sup>The many reductions in the employee force at Novell through the last decade have been front-page news in this community.

respondent to protect his family and his income by finding a new job before being laid off. In addition, this change of employment occurred before the parties' separation and the filing of this divorce.<sup>11</sup> This court refuses to delve into decisions made by the parties before the time of the separation, as it is not the duty of this court to revise decisions made by the parties before this court had jurisdiction. Thus, the court makes no finding as to respondent's income at Novell and will not include the income at Novell in its calculations and decision regarding imputation of income.

126. After leaving Novell, the respondent secured employment with the Corporation of the Presiding Bishop ("LDS Church"). He worked for the LDS Church from approximately June 2001 through October 2003. When he stopped working for the LDS church, he was earning approximately \$2,574.00 gross per two-week pay period, or \$5,577.00 gross per month (\$66,924.00 per year). See Trial Exhibit 21.

127. While employed with the LDS church, the respondent was recruited by Brigham Young University ("BYU"). He worked for BYU from October 2003 through February 17, 2006. Before the respondent was terminated from his position at BYU, he grossed approximately \$5,996.00 gross per month (\$71,952.00 per year). See Trial Exhibit 23 at p.5. The respondent voluntarily resigned from BYU, because he failed to maintain an LDS temple recommend as required for employment.<sup>12</sup> He lost his temple recommend because he was

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<sup>11</sup>The petitioner's testimony was that she opposed his change of employment, while the respondent testified that it was a mutual decision.

<sup>12</sup> At the August 24, 2006 hearing before Judge Taylor, the court ordered that the petitioner could depose the respondent regarding the "temple recommend issue." See Order, signed November 13, 2006. The petitioner claims that, due to the respondent's subsequent discovery delays, the petitioner was not able to depose the respondent on this matter.

The petitioner cites a November 2006 Order on Motion for Default Judgment, stating that it "provides that if 'Petitioner is unable to present the necessary evidence based on Respondent's

excommunicated.

128. The respondent began his current employment with Medicity in May 2006, where he earns \$5,000.00 gross per month (\$60,000.00 per year).

129. The petitioner urges the Court to make a finding that the respondent has the ability to earn his previous BYU income (\$5,996 per month) since he voluntarily acted in such a way as to cause him to lose his employment. In contrast, the respondent requests that the court use his current income of \$5,000 per month in determining alimony, if any.

130. Pursuant to Utah Code Ann. § 78-45-7.5(7)(a), if the respondent is voluntarily unemployed or underemployed, income may be imputed to him. "Income may not be imputed to a parent unless the parent . . . is voluntarily unemployed or underemployed." U.C.A. § 78-45-7.5(7)(a). Utah case law suggests that a parent is voluntarily unemployed or underemployed if, at least, some evidence suggests that the parent's current, diminished income level resulted from "his personal preference or voluntary decisions," instead of from "events beyond his control." *Hall v. Hall*, 858 P.2d 1018, 1025 (Utah Ct. App. 1993).

131. The court has already indicated that it will not consider the pre-separation income from Novell; therefore, the court will consider the incomes earned by the respondent at the LDS Church, BYU, and Medicity. Again, those monthly incomes are: (1) \$5,577.00 gross per month (\$66,924.00 per year) at the LDS Church; (2) \$5,996.00 gross per month (\$71,952.00 per year) at BYU; (3) \$5,000.00 gross per month (\$60,000.00 per year) at Medicity.

132. The highest income of the three is the BYU income at \$5,996.00 gross per month.

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failure to provide necessary evidence through discovery, Respondent will be precluded from defending on such issues." The court can not find such order in the file, nor does the court recall the petitioner asserting this theory in trial. In addition, testimony was taken from the respondent in which he explained that he voluntarily resigned, rather than allowing himself to be fired by BYU.

This is income which the respondent lost, because of activities which resulted in his excommunication from the LDS Church and his subsequent inability to hold a temple recommend. Unlike his voluntary departure from Novell for a lower-paying job in lieu of a possible layoff, his voluntary resignation from BYU was the result of his own actions. Therefore, the court finds that the respondent could, most likely, still be earning this income today, had he not voluntarily failed to satisfy the requirements for continued employment at BYU. Thus, the court finds that the respondent is voluntarily underemployed pursuant to U.C.A. § 78.45-7.5(7)(a).

133. Accordingly, the court finds that respondent has the ability to earn \$5,996.00 gross per month (\$71,952.00 per year).

134. The respondent married Brenda Louise Bruni in October 2005. As part of a pre-nuptial agreement signed by the respondent and Ms. Bruni, he pays her monthly house payment of \$752.00. See Trial Exhibit 30 and 35. He also pays her \$1,500.00 per month to help with living expenses.

135. Ms. Bruni's daughter, Sarah, has always lived with them. Ms. Bruni no longer receives any child support for Sarah, but Sarah pays her mother \$360.00 per month (and sometimes less) to help with expenses. Ms. Bruni does not consider this regular income, as Sarah does not always have the money to pay. Ms. Bruni's older daughter and infant child also lived with them from February through April 2006, as did Ms. Bruni's mother from January or February 2006. Her mother has helped her financially at times, but it is not income that can be depended upon. Her mother has terminal cancer.

136. "In determining alimony, the income of any subsequent spouse of the payor may not be considered, except . . . [t]he court may consider the subsequent spouse's financial ability to

share living expenses . . . .” U.C.A. § 30-3-5(8)(g)(iii)(A). This court does not find that Ms. Bruni’s medical history, recent work history, and spotty income from her daughter justify great reliance upon Ms. Bruni’s income for determining the appropriateness of alimony. The occasional gifts of money from Ms. Bruni’s mother cannot be considered income for purposes of this determination. It is clear to this court that the respondent would have to pay at least \$752.00 per month to rent a decent place to live for himself, were he not remarried and living in Ms. Bruni’s home. The payment of \$1,500 per month by the respondent to Ms. Bruni to help defray living expenses is certainly not unreasonable, given today’s economy and the monthly expenses claimed by both the petitioner and the respondent. The money she brought from Oregon after her divorce is now gone, so she no longer has any reserve cash to supplement her income.

137. The court finds that, pursuant to U.C.A. § 30-3-5(8)(g)(iii)(A), there is no steady income from Ms. Bruni that the court can include in its calculations. Ms. Bruni is not capable of sharing the living expenses with the respondent, other than the \$360.00 from her daughter, which only covers Sarah’s expenses in the home (food, utilities, etc.).

#### **4. Length of Marriage**

138. The parties were married on November 22, 1986 and divorced on September 12, 2005. Thus, the parties were married two months short of 19 years.

#### **5. Whether Petitioner has Custody of the Minor Children**

139. As set forth above, the petitioner has full physical and legal custody of five minor children that require support. The respondent will be ordered to pay child support based upon his imputed income of \$5,996.00.

#### **6. The Fault of the Parties**

140. Although the petitioner only alleged “irreconcilable differences” her divorce petition, she testified that the divorce was caused by the respondent, because he sexually abused the children. She never amended the petition, and neither party testified as to when the sexual abuse of the children occurred.

141. The petitioner also testified that in January 2001 she placed the CINTAS stock into a joint account, due to pressure from the respondent during marriage counseling sessions, which had begun in December 2000. Neither party offered an explanation for their participation in marriage counseling at that time, which was many months prior to the parties’ final separation in October 2001.

142. Therefore, the court finds that it does not have enough clear testimony to place all of the blame on the respondent for this divorce, despite the unopposed testimony regarding the sexual abuse of the children. Thus, this court makes no finding that the respondent alone caused the marriage to terminate.

#### **7. Analysis under U.C.A. § 30-3-5(8)**

143. The petitioner requests that the court order the respondent to pay future alimony in the amount of \$3,259 per month for 19 years. The respondent withdrew his request for future alimony, but requested a credit for the alimony he has paid since the petitioner became employed in the spring of 2003.

144. While this is a marriage of almost 19 years’ duration, the court can see no reason to award the petitioner alimony for another 19 years, especially when she is making more money than the respondent makes—even using the court-imputed income of \$5,996.00 per month for the respondent. Their incomes differ by \$673.00 per month and \$8,076.00 per year—with the advantage going to the petitioner. In addition, the parties had chosen to have the petitioner stay



at home to raise the children and were living on only one income when they separated in October 2001. She did not return to full-time work until the spring of 2003 and later that year obtained her current employment with an income now of \$80,000.00 per year. Together they are bringing in \$151,952.00 per year (his imputed income of \$71,952.00, plus her income of \$80,000.00), compared to the \$66,924.00 per year the respondent was making at the LDS Church when they separated in October 2001. Their collective income has more than doubled since their separation.

145. In addition, since the petitioner has the physical custody of the children, she will also be receiving \$4,560.00 per year from the respondent for child-care expenses, along with child support of \$16,728.00 per year (\$1,394.00 per month). This is a total of \$21,288.00, above and beyond her annual salary of \$80,000.00.

146. Were this court to award the petitioner the monthly alimony of \$3,259.00 she seeks, plus the monthly average child-care cost of \$380.00 awarded to her by the court (for a total of \$3,639.00), the respondent, according to his financial declaration, would have \$73.46 left of his net income to pay child support and the rest of his monthly expenses. See Exhibit 35.<sup>13</sup> This would be an unconscionable award to the petitioner.

147. So, does the petitioner deserve any alimony at all? This court finds that she did—during the time after the filing of this action before she obtained her new well-paying job. The parties' agreement in May 2002 was \$230 per month, which the parties, obviously, thought was appropriate at the time. The court also finds that \$230 per month was appropriate until the

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<sup>13</sup>The court has imputed income \$996.00 above what the respondent used in his financial declaration, so the court is not able to correctly estimate what his net income would be. He lost 29% of his real income through deductions; if the court used that same 29% and subtracted it from his imputed monthly income, that would leave him \$4,257.16 of his imputed income, for an increase of \$691.62 net. This is still not enough for him to live on and pay child support.

petitioner began her new job in November 2003. Therefore, the court awards the respondent a credit against other amounts due under these findings (or other judgments already awarded) from November 2003 through the time of trial, November 2006, inclusive. That would be calculated at \$230.00 x 37 months, for a total of \$8,510.00. Therefore, the respondent will receive a credit of \$8,510.00 for alimony already paid.

148. Because the parties' income and living circumstances are comparatively even and their collective income has more than doubled since the time of their separation in October 2001, the court denies the petitioner her request for future alimony and makes no order regarding future alimony.

## **XI. CHILD SUPPORT**

### **A. Respondent's Contempt for Unilaterally Changing Child Support**

149. In May 2002, the respondent was ordered to pay \$1,797.00 per month in child support beginning April 1, 2002. See May 2002 Order at ¶ 3. This amount was agreed upon by the parties, stipulated to in court, and based upon their incomes at the time.

150. At a hearing on June 24, 2004, the court ordered that the respondent's child support obligation would be reduced to \$1,169.00 per month for six children based upon the parties' current incomes. See Order signed August 5, 2004 at ¶ 4. This order was based upon petitioner's income of \$6,250.00 per month gross (\$75,000.00 per year) and respondent's income of \$5,750.00 per month (\$69,000.00 per year). The new amount was effective July 1, 2004.

151. No evidence was presented to the court that this order was ever modified, nor can the court find any orders of modification in the file.

152. From November 2005 through February 2006, the respondent paid child support of only \$1,090. See also Trial Exhibit 10. From March 2006 through May 2006 he only paid

\$45 per month. Id. Finally, the respondent only paid \$840 per month in child support from June 2006 through August 2006. Id.

153. At a hearing on May 15, 2006, the parties stipulated that the petitioner had established a prima facie case regarding the respondent's contempt for underpaying his monthly child support obligations without leave of the Court. See Order signed July 28, 2006 at ¶ 5. The respondent reserved his right to dispute the contempt issue. At trial the respondent admitted that he was aware of the court orders regarding child support, and he failed to provide any evidence that the June 2004 order ever changed. Accordingly, the court holds the respondent in contempt for underpaying his child support payments without leave of the court.

#### **B. Respondent's Failure to Pay Child Support**

154. Respondent's child support obligation of \$1,169.00 per month was originally calculated for six minor children based on Petitioner's gross income of \$6,250 per month and Respondent's gross income of \$5,750 per month. See Order signed August 5, 2004 at ¶ 4. Although it is undisputed that one of the minor children turned 18 in October 2005, such does not automatically entitle the respondent to unilaterally reduce his child support obligations without a court order. Not only did the number of minor children change, but the parties' gross monthly incomes were also different at that time. If the court allowed a party to unilaterally make changes to court-ordered obligations every time he or she determined a change in circumstance had occurred, it would nullify the authority of the court and render petitions to modify meaningless. Thus, the respondent did not have authority to unilaterally change (and underpay) his child support obligations.

155. As a result, on June 16, 2006, the court awarded the petitioner a judgment of \$2,248.00 in child support arrearages as of April 13, 2006. See Order signed July 28, 2006 at ¶

1. In addition, on August 28, 2006, the court awarded the petitioner a judgment of \$2,103.00 in child support arrearages. See Order signed November 21, 2006 at ¶ 2.

156. Further, pursuant to the petitioner's testimony at trial, the court awards the petitioner a judgment against the respondent for \$489.68 in additional child support arrearages.

157. The court also finds that these judgments (and attorney's fees spent in obtaining these judgments) are classified as family support and/or maintenance, because child support is necessary to provide the children with a living. Moreover, the petitioner is awarded her attorneys' fees and costs incurred in obtaining these judgments against the respondent regarding child support and as a sanction for the respondent's contempt.

158. The respondent requested a credit for child support he paid while the petitioner was working from the spring of 2003 until it was actually reduced in July 2004. He also requested to have child support recalculated from October 2005 to the present. However, the respondent failed to present any evidence regarding the petitioner's varying incomes during these time periods.

159. Therefore, the court has no evidentiary basis for determining what credit, if any, to which the respondent would be entitled. Rather than recalculating years of child support and attempting to determine both parties' income over the course of those months and years, the court in its discretion will simply determine child support from the time of trial going forward. Accordingly, the respondent is not entitled to a credit for child support paid from the spring of 2003 through July 2004, nor is he entitled to a recalculation of child support from October 2005 to the present.<sup>14</sup>

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<sup>14</sup>Indeed, given the income imputed to the respondent, he might be less than satisfied with the result, were the court to recalculate all child support since the inception of this divorce action.

### C. Child Support from October 2001 through April 2002

160. Petitioner testified that before the parties separated, the respondent used to deposit his paycheck into the bill-paying account to cover family expenses. See Trial Exhibit 12. However, from the time the parties separated in October 2001 until the respondent was ordered to pay child support as of April 1, 2002, the respondent failed to provide any support to the family. Id. The petitioner testified that she was forced to solely provide for all of the children and family living expenses from her own funds during this time period even though she was not working. She now asks for back support for that six-month period.

161. As far as the court can determine, this matter has never been brought before the court and has not been reserved by the petitioner. The court will not go back to the parties' separation to award back child support.

### D. Future Child Support

162. Utah Code Ann. § 78-45-7.5(7)(a) allows this court to impute income to the respondent for purposes of child support if he is voluntarily unemployed or underemployed. Using the same analysis as it did in the above section on alimony, the court finds that the respondent is voluntarily underemployed pursuant to U.C.A. § 78.45-7.5(7)(a) and income shall be imputed to him at \$5,996.00 gross per month (\$71,952.00 per year) for purposes of calculating child support. Petitioner's income for purposes of child support shall be \$6,669 gross per month (\$80,000.00 per year). See Trial Exhibit 9. Child support shall be calculated for five minor children.

163. Since the time of trial, the Utah State Legislature has modified the child support income tables, effective April 30, 2007, for modified and future child support. Rather than estimating the base child support amount under the prior statute, the court has used the new

statutory amount established for combined incomes of \$12,665.00 per month as a guideline.

Using the above-listed incomes, the court has determined that (1) the combined income of the parties is \$12,665.00 per month; (2) the base child support for their income is \$2,967.00; (3) the petitioner makes 53% of the combined income, while the respondent makes 47% of the combined income; (4) the parties' respective shares of the child support obligation are: petitioner, \$1,573.00 and respondent, \$1,394.00.

164. The court orders the respondent to pay \$1,394.00 for the support of the five minor children as of the first date of trial, November 22, 2006.

## **XII. STOCKS**

### **A. Novell Stock**

165. On May 7, 2002, the court awarded the petitioner the Novell stock as her sole and separate property, pursuant to a stipulation of the parties. See May 2002 Order at ¶ 9. The petitioner testified that she sold this stock in December 2004 and used the \$14,000.00 she received for attorney's fees. The respondent testified that he is not making a claim for this stock, but argues that the court "can consider this stock division in the other property divisions and do equity in this case." As the respondent provided no support for the petitioner during the early months of their separation, the court is not inclined to set off this stock and its value against any other property of the marriage. Thus, the respondent shall not receive a credit for this amount.

### **B. CINTAS Stock**

166. In 1997 the petitioner received a gift of CINTAS stock from her uncle; she placed the CINTAS stock in a private and separate account. See Trial Exhibit 2 at January 2001 statement. The respondent accused her, during a session of marriage counseling, of not being a "team player"--due to the separate CINTAS stock account. Because of that accusation, she felt

coerced to place the CINTAS stock into a joint account in January 2001. Id. at April 2001 statement. The respondent's name did not appear on the account until April 2001; however, the respondent had access to the account as early as January 2001.

167. In April 2001 the respondent borrowed against the CINTAS stock to purchase other stock without the petitioner's permission. Id. Subsequently, on July 19, 2001 the respondent sold the CINTAS stock for \$31,784.98. Id. at July 2001 Statement. However, the parties only received approximately \$18,000 in cash, since the remaining proceeds were used to pay off the respondent's outstanding debt for the purchase of the other stocks. The petitioner has not successfully demonstrated for the court that she did not receive any benefit from the remaining monies, which were used to buy other stocks.

168. The court finds that the CINTAS stock was the petitioner's separate property and that it retained its separate identity, despite being moved into a joint account. The respondent certainly did not contribute to the enhancement, maintenance, or protection of the stock or its value and did not, thereby, acquire an equitable interest in it. Oliekan v. Oliekan, 147 P.3d 464, 469 (Utah Ct. App. 2006), citing Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988). Therefore, the petitioner is entitled to a judgment of \$18,000.00 against the respondent.

169. The petitioner testified that she used the \$18,000 in cash to support the family between the time the parties separated in October 2001 until the May 2002 Order entered. See also Trial Exhibit 11 and 12. Since this \$18,000.00 was her sole and separate property and marital funds should have been used to support the family instead, the court now awards her a judgment for \$18,000.00 and, further, finds that this \$18,000 is classified as family support and/or maintenance, since the funds were spent to support the family. This \$18,000.00 debt was incurred before the filing of the bankruptcy petition judgment.

### **C. TwinLabs Stock**

170. Refer to "Home Equity Line of Credit/Second Mortgage" category above.

## **XIII. MARITAL DEBTS**

### **A. Pre-separation Debt**

171. After the parties separated, the petitioner transferred a joint, marital MBNA credit card debt of \$2,400.00 into her name only; the respondent does not dispute that the MBNA debt is a marital debt. The court awards judgment now against the respondent for \$1,200.00, as his share of his marital debt.

### **B. Debt During Separation**

172. At approximately the same time the parties separated, the respondent took out a \$1,900.00 quick draw loan. The petitioner testified that she never saw this money, but that she ultimately paid this loan back. The respondent failed to offer any evidence regarding this issue. The court shall now awards the petitioner a judgment against the respondent for \$1,900.00. This debt was incurred before the filing of the bankruptcy petition judgment.

## **XIV. TAX EXEMPTIONS**

173. The respondent requested that the parties split the tax exemptions every year. The court makes the following order: (1) The parties will split the tax exemptions each year; (2) If there is an odd number of children still receiving child support, the parties will alternate the extra deduction every other year with the petitioner being granted the odd-child exemption on odd-numbered years and the respondent being granted the exemption on even-numbered years. Therefore, for example, the petitioner will claim the odd-child exemption this year, 2007.

174. However, the respondent may not claim the children as tax exemptions unless he is current on his obligations to the children, pursuant to the appropriate statutes which deal with



this issue.

## **XV. CONTEMPT**

### **A. Respondent's Contempt for Repeated Discovery Delays (i.e., Psychological Records, Financial Records, Changing Position Regarding Custody) and Failures to Comply with Court Orders**

175. Petitioner requested that the court find the respondent in contempt for his numerous discovery delays and repeated failures to comply with court orders; she also requested a monetary judgment against the respondent as a sanction. While the court holds both parties responsible for their failures to respond adequately to discovery requests, the court will not find the respondent in contempt for altering his goals in this litigation. i.e., supervised visitation, etc. The nature of divorce litigation is that, after discovery, court hearings, and negotiations, parties change their minds about what should be pursued during the litigation. Holding parties in contempt for changes of strategy would stagnate divorce litigation and prevent settlement. In addition, the court will not hold the parties in contempt for failure to provide discovery regarding discovery which would have never been admitted, pursuant to state statutes, i.e., polygraph results. Finally, the court will not hold the respondent in contempt for filing his bankruptcy petition, as the court has no persuasive evidence before it that the only reason for filing the petition was to delay the divorce proceeding.

176. On November 8, 2006, the petitioner filed a Motion for Default Judgment and memorandum in support ("Default Judgment Memorandum"), wherein she outlined a history of the respondent's repeated discovery delays and failures to comply with court orders. See November 8, 2006 Default Judgment Memorandum.

177. Beginning in July 2002, the petitioner served her first discovery request upon the respondent. See August 2002 Certificate of Service. However, in his August 2002 responses,

the respondent failed to provide, among other things, a financial declaration (not produced until May 2003), monthly statements from his bank accounts and credit card accounts and complete information on his life insurance policy. See Respondent's Answers attached to Default Judgment Memorandum as Exhibit A.

178. In September 2003, the petitioner served another discovery request upon the respondent to produce all test results for ISAT, sexual or psychological examinations and any tests with Dr. C.Y. Roby. See September 2003 Certificate of Delivery of Discovery. After five months the respondent had failed to respond to this discovery request. See Pleadings. Thus, in March 2004, the Guardian ad Litem filed a Motion to Compel for the same test results that the petitioner was seeking. See March 2004 Motion to Compel.

179. By August 2004, the respondent still had not provided any further discovery. See Pleadings. Thus, the petitioner filed a Motion to Compel production of the sexual test results and financial information (i.e., a current financial statement, all bank and credit card information from September 2001 through June 2004 and a list of deposits and purchases). See August 19, 2004 Affidavit in Support of Motion to Compel. The respondent filed an opposition memorandum claiming he had already provided the requested discovery or the documents were not in his possession. See September 20, 2004 Response to Petitioner's Motion to Compel.

180. The parties came before the court in September 2004 on the petitioner's Motion to Compel. See September 21, 2004 docket entry. However, the day before the motion to compel hearing, the respondent provided documents that were partially responsive to the petitioner's first discovery request from more than two years ago. See Respondent's September 2004 Responses attached to Default Judgment Memorandum as Exhibit F. Further, the respondent also failed to produce the psychological and sexual test results as requested in

September 2003. Id.

181. At the September 2004 motion to compel hearing, the court ordered the respondent to comply with “all [of Petitioner’s] requested documents within two weeks”, including the production of signed releases for “all psychosexual records as well as the other requested discovery.” See September 21, 2004 Order at ¶ 3. However, the respondent provided the petitioner only one signed release for Dr. Roby. See Respondent’s October 6, 2004 Second Supplemental Response to Petitioner’s Request for Production of Documents attached to Default Judgment Memorandum as Exhibit H.

182. In October 2004, more than two weeks after the court’s order, the petitioner filed a notice with the court of the respondent’s refusal to sign the remaining releases, including a release for ISAT.<sup>15</sup> See October 12, 2004 Notice to Court of Willful Refusal. Immediately thereafter, the respondent filed a notice with the court claiming he had allegedly complied with the court’s order, when in reality he had only signed one release and failed to produce any other documents. See October 18, 2004 Notice to the Court of Respondent’s Compliance.

183. In March 2005, the petitioner filed a motion on order to show cause regarding discovery issues. See March 2005 Motion in Support of Order to Show Cause. She requested that the respondent show cause why he should not be sent to jail for his failure to produce, among other things, a current financial declaration, signed releases for various financial institutions, and a list of deposits and purchases. Id. at ¶¶ 3-7.

184. In April 2005, at the order to show cause hearing, the court again found that the respondent “has not been forthcoming in his efforts to comply with multiple discovery requests.

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<sup>15</sup> Petitioner’s Notice also indicated that she had not received a release for Dr. Roby. However, Petitioner filed her Notice on October 8 and Respondent indicates he filed his release for Dr. Roby on October 6. Thus, Petitioner had not yet received the release for Dr. Roby when she filed this notice.

However, to strike his pleadings would be a last resort by the Court.” See April 18, 2005 Order at ¶ 3. Also, the court again ordered the respondent to sign releases for all requested information (i.e., financial, psychosexual, etc.). Id. at ¶ 5. Further, the court “ordered Respondent to serve five (5) days in the Utah County Jail as a direct result of his continued non-compliance with discovery requests and contempt of court in this matter.” Id. at ¶ 8. However, the court stayed the sentence because the county jail was near capacity “and only for that reason.” Id. If the respondent failed to sign the releases within two weeks of the hearing, he was to be “ordered to serve these five (5) days in the Utah County Jail at the next hearing.” Id.

185. The following week, the respondent filed another notice of compliance with the court. See April 28, 2005 Notice of Compliance. Further, the respondent testified at trial that in a subsequent review hearing on May 16, 2005, he indicated to the court that all the releases had been signed and discovery was complete. However, the respondent admitted at trial that he had actually withdrawn his releases from Dr. Roby on May 9, 2005, almost two weeks before the review hearing at which the respondent indicated all releases had been signed. Although the respondent claimed at trial that he withdrew his release after “everything had been gotten a hold of by lawyers”, the petitioner testified that she did not receive the documents until November 2005.

186. In early April 2006, the petitioner sent another discovery request, but the respondent failed to timely respond. See April 11, 2006 Certificate of Service of Discovery. In May 2006, the parties came before the court for yet another hearing on discovery. See May 15, 2006 Docket Entry.

187. Also in mid-May 2006, at a pretrial conference, the court ordered the respondent to respond to the petitioner’s discovery requests and trial was rescheduled for August 2006.

Finally, at the end of June, the respondent responded to Petitioner's April 2006 discovery. See Respondent's June 2006 Responses to Petitioner's Second Set of Interrogatories attached to Default Judgment Memorandum as Exhibit S. However, his answers to the interrogatories were incomplete and evasive. Id. For example, in response to Interrogatory No. 4, the respondent failed to identify the amounts in each account or the account numbers. Id. Also, in response to Interrogatory No. 5, the respondent did not identify a branch or account location for each account. Id. Most significant was the respondent's refusal to answer interrogatories 8-15 because they allegedly went beyond the amount of interrogatories allowed under the Utah Rules of Civil Procedure. Id. In addition, the respondent failed to produce any documents. Id.

188. In mid-July 2006, the petitioner filed a motion to compel the respondent to produce the remaining discovery. See July 13, 2006 Motion to Compel. Further, because the respondent had not provided the requested discovery by the end of July 2006, the petitioner was forced to file a motion to continue the trial. See July 28, 2006 Motion to Continue Trial Date.

189. At the phone conference, the court agreed to continue the trial again to November 2006. See July 31, 2006 Docket Entry. Also, at a subsequent pretrial hearing on August 24, 2006, the court again ordered the respondent to produce specified documents by September 24, 2006. See August 24, 2006 Order. Further, at this hearing, Judge Taylor stated:

Now, if I authorize Mr. Weckel to withdraw, I will not, I will not change these deadlines. . . . So when you go to hire new counsel, if you go hire new counsel, you must tell them, '***I have discovery deadlines in place . . . which will not be moved unless somebody dies . . . .***'

See August 24, 2006 Audio Recording.

190. The parties scheduled the depositions of the respondent and his new wife for October 11. See October, 2, 2006 Notice of Deposition. However, these depositions never took

place due to the respondent's failure to timely produce discovery. On October 17, 2006 the parties had another phone conference with the court. See October 17, 2006 Docket Entry. Once again the court ordered the respondent to complete discovery. Id. The respondent's deposition was rescheduled for November 6, 2006. See October 25, 2006 Notice of Deposition. However, the respondent failed to timely produce the discovery as ordered by the court. See Pleadings and November 14, 2006 Order at ¶ 5.

191. Finally, on November 7, 2006 (two weeks before trial) the petitioner filed a Motion for Default Judgment because she had not yet received discovery from the respondent as ordered by the Court. See November 7, 2006 Motion for Default Judgment. This motion was ultimately denied; however, the court found that, because of the respondent's long-term failure to respond to discovery requests, a sanction of five (5) days in jail was appropriate. In her proposed memorandum decision, the petition quotes an order which can not be found in the court file; however, the court's minute entry reflects the order of jail. The respondent was given time to purge that contempt by replying to the requested discovery. His request to continue the trial, due to the late entry of his new attorney, was denied. The court finds that, through the efforts of his new attorney, the respondent substantially complied with the discovery requests by the time of trial.

192. Accordingly, the court makes a finding that the respondent has displayed a distinct pattern of withholding, evading and avoiding discovery and that he has repeatedly failed to comply with court orders. The petitioner requests a judgment against the respondent in the amount of \$10,000 as a sanction for his behavior. This court does not believe that a \$10,000 sanction is appropriate in this matter. However, the court believes that the respondent's intentional efforts to thwart discovery have increased the petitioner's attorney's fees substantially

and will, therefore, increase her award of attorney's fees accordingly.

### **B. Petitioner is Not in Contempt**

193. Although not clearly requested, the court infers that the respondent sought to have the court also find the petitioner in contempt for allegedly failing to comply with discovery. It is undisputed that in early 2005, the petitioner did not produce documentation for two bank accounts. The petitioner testified that she did not produce said documents because the respondent had been using the information to interfere with her accounts. The court ordered on March 7, 2005 that neither party could use the information received pursuant to discovery to interfere with any accounts of the other party. See March 7, 2005 Order at ¶ 1. The court also ordered the petitioner to produce the requested documents within two weeks, but the court never made a finding that the petitioner was in contempt. Id. at ¶ 2.

194. Subsequently, the respondent testified this same issue arose on February 23, 2006. However, this was merely a pretrial conference and no motions were pending regarding the petitioner's discovery. The respondent also testified that this same issue arose in the August 24, 2006 hearing. Yet, the only motion pending for that hearing was Petitioner's Motion to Compel Respondent to produce discovery. The respondent had not filed any motions claiming the petitioner failed to comply with discovery; the judge simply ordered the petitioner sua sponte to produce the same documents that the respondent was ordered to produce.

195. The court does note that there were delays in this case because the petitioner changed attorneys—one change resulting in a delay of trial.

196. Accordingly, the court does not find the petitioner in contempt, but notes that her hands are not completely clean.

### **C. Contempt for Individual Issues**

197. Refer to the individual issues above for the court's finding of contempt as to each issue. **XVI.**

## **ATTORNEYS' FEES**

### **A. Fourth District Court Domestic Case**

198. Both parties requested that they be awarded attorneys' fees for this domestic matter. This court has authority to award attorneys' fees and costs "upon determining that the party substantially prevailed upon the claim or defenses." U.C.A. § 30-3-3(2). Further, an award of attorneys' fees must be based on the reasonableness of the fees requested, the financial need of the receiving spouse and the ability of the other spouse to pay." Wells v. Wells, 871 P.2d 1036, 1040 (Utah Ct. App. 1994) (citation omitted).

199. Has the petitioner substantially prevailed upon her claims? The court looks at the overall success of the petitioner on the important issues. The petitioner did successfully obtain imputation of the respondent's salary, but not the higher level she sought. While she was awarded somewhat less than she requested for child support, she was not at all successful in her quest for a exorbitant amount of future alimony. She wasted incredible amounts of time, energy, and attorney's fees on small issues, such as the gym equipment and the entertainment center. She was successful in her request regarding the CINTAS stock, but not regarding the Twin Labs stock. She was not awarded the \$64,000 she wanted for making the house payments, but she was awarded a substantial amount of the money she put into the repair and maintenance of the marital home. She was also rewarded some reimbursement for the home equity line of credit. She was not awarded the child-care expenses she sought. Overall, the petitioner was not successful in her presentation of many of the major issues before this court.

200. The court must also evaluate the reasonableness of the fees, the financial needs of



the petitioner, and the ability of the respondent to pay her fees. The court finds that the fees incurred by the petitioner are not reasonable, but are truly beyond reason for a marital estate of this size. The court is appalled at the effort that went into minor areas, such as the \$180.00 in used gym equipment and the used \$75.00 entertainment center. Some of the petitioner's requests were absurd, such as the amount requested for alimony and reimbursement for all of the house payments. The respondent should not have to pay for attorney's fees incurred in pursuing such unreasonable requests.

201. However, the court does consider reasonable an award of attorney's fees based upon the respondent's pattern of obstructing the discovery process. The failure of the respondent to timely and fully respond to the petitioner's discovery requests has certainly increased her attorney's fees in this matter. See the discussion on contempt.

202. As for the financial needs of the petitioner, she makes more money than the respondent and will be receiving monthly financial help from him. She is more than capable of paying her own attorney's fees, as is the respondent capable of paying his own fees.

#### **B. Previous Orders to Show Cause**

203. An award of some of the petitioner's attorneys' fees could also be independently based upon every order to show cause in which she substantially prevailed:

- In the May 2002 Order, the petitioner was awarded custody, child support, health insurance, car insurance, Novell stock, child care expenses. See May 7, 2002 Order.
- In the June 2004 Order, the petitioner was awarded reimbursement for reasonable child care expenses. See June 24, 2004 Order. Also, the respondent's request to alter alimony was denied because he had not completed psychosexual testing as previously ordered by the Court. Id.
- In the September 2004 Order, the respondent was ordered to produce requested documents within two weeks and to sign the necessary releases. See September 21, 2004 Order. The petitioner also received a judgment for unpaid child care expenses.

Id.

- In the December 2004 Order, the respondent was ordered to sell the RV and his request to stay garnishment proceedings was denied. See December 2, 2004 Order.
- In the August 28, 2006 Order, the court entered a judgment against the respondent for unpaid child support, medical insurance and child care expenses. See August 28, 2006 Order. Further, the court made a finding that “Petitioner’s attorney substantially prevailed on the issues before the court.” Id. at ¶ 5.

Since the issue of attorneys’ fees was reserved for each of these matters, the court now finds that the petitioner’s general award of attorneys’ fees is also based on the petitioner’s success in each of these individual orders to show cause.

204. Further, the court already awarded the petitioner attorneys’ fees in the April 2005 and June 2006 Orders. See April 18, 2005 Order at ¶ 7 and June 15, 2006 Order at ¶ 4. Rather than require an individual affidavit of attorneys’ fees for each order to show cause, the court will accept a final, all-inclusive affidavit of fees incurred by the petitioner throughout this litigation.

**C. Conclusion as to Petitioner’s Divorce Litigation Fees**

205. The court finds that the petitioner was not substantially successful on the issues she presented to the court, that the total bill for attorney’s fees and costs of \$83,349.61 was not reasonable, and that she makes more money than the respondent and will be receiving financial help from him on a monthly basis. On the other hand, the respondent’s efforts to avoid or delay discovery have cost the petitioner a great deal in attorney’s fees and delays. Therefore, the court finds it appropriate that the respondent should pay for 15% of the petitioner’s attorney’s fees, for a total of \$12,502.00. The court will allow the respondent to pay this amount, with the statutory interest, over the next 10 years at the rate of \$1,250.24 per year, plus the appropriate interest.

**C. Bankruptcy Attorneys’ Fees**

206. Petitioner requested that a judgment enter against the respondent in this matter for

attorneys' fees she has incurred in the Bankruptcy Court. In Condie v. Condie, 139 P.3d 271 (Utah Ct. App. 2006), the Court of Appeals explained that "as a general rule, attorney fees are not awardable under federal bankruptcy law [in a bankruptcy action] for enforcement of obligations contained in a divorce decree." Id. at 275. Thus, the Court of Appeals held that the trial court erred in ruling that the wife should have requested her fees in the Bankruptcy Court. Instead, the Court of Appeals' holding implied that the former wife must seek an award in state court for attorneys' fees incurred in a bankruptcy action. Id. at 276. See also In re Marriage of Wright 841 P.2d 358 (Colo. Ct. App. 1992).

207. Further, the Court of Appeals explained that the state trial court had authority to award bankruptcy attorneys' fees to the former wife pursuant to UTAH CODE ANN. § 30-3-3(2), which provides that, "[i]n any action to enforce an order of . . . child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense."

208. In compliance with U.C.A. § 30-3-3(2), the petitioner testified that she filed an adversarial proceeding against the respondent in the bankruptcy court in order to save the marital home. Ms. Drake, the petitioner's bankruptcy attorney, also testified that the petitioner filed the adversarial proceeding to protect the marital home and to prevent the respondent from discharging his family debts to the petitioner (e.g., child support, alimony, etc.). Similar to Condie, Ms. Drake confirmed that the petitioner will not receive an award of her bankruptcy attorneys' fees in the Bankruptcy Court.

209. Using the same analysis as above, this court finds that the petitioner was somewhat substantially successful on the bankruptcy-related issues of child support, but not on alimony. The issue of the marital home was not litigated before this court, while the issues of

personal property were—to some small extent.

210. Accordingly, this court awards the petitioner her attorneys' fees incurred in the bankruptcy action at the same rate as in the divorce case proper—10%. See U.C.A. § 30-3-3(2). See also Condie, 139 P.3d at 274-76. In addition, Ms. Drake submitted an affidavit of attorneys' fees for the bankruptcy case in the amount of \$26,401.00 as of December 12, 2006. See Trial Exhibit 28. Ms. Drake testified about her experience in bankruptcy law and stated that her fees were reasonable for someone with her experience in Salt Lake County. This court finds that the bankruptcy attorneys' fees incurred by the petitioner are reasonable. The court orders the respondent to pay the sum of \$3,960.00 in attorney's fees for Ms. Drake's work in the bankruptcy matter. The court will allow the respondent to pay this amount, with the statutory interest, over the next 5 years at the rate \$792.00 per year, plus the appropriate interest.

#### **D. Attorney's Fees for the Respondent**

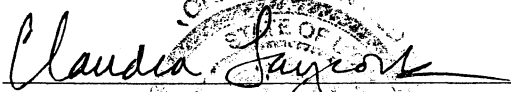
211. As the respondent has not requested that the petitioner pay his attorney's fees, the court makes no corresponding order, nor does the court believe that such an order would be appropriate.

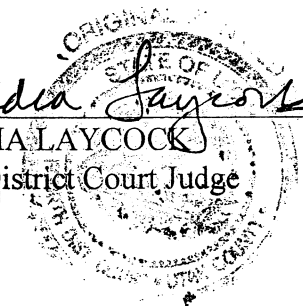
### CONCLUSIONS OF LAW

1. The Court concludes that it has both subject matter and personal jurisdiction over the issues, children and parties in this action.

2. The Court concludes that the parties are entitled to orders relating to real property, personal property, debts and obligations, alimony, property rights, issues relating to the children including but not limited to child support, day care, visitation, and tax exemptions; and attorney's fees as more fully set forth in the foregoing Findings of Fact.

DATED this 24<sup>th</sup> day of June, 2008.

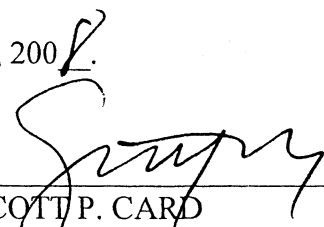
  
CLAUDIA LAYCOCK  
Fourth District Court Judge



**U.R.C.P. RULE 7(f) NOTICE**

The foregoing Findings of Fact and Conclusions of Law has been submitted to the Court for execution and entry. Rule 7(f), of the Utah Rules of Civil Procedure, allows five (5) days following hand-delivery, or five (5) days plus three (3) days for mailing if service by mail, for opposing counsel or opposing parties to submit notice of objection. If such objection as to form is not received within the prescribed time period, the Order will be submitted for signing by the Court.

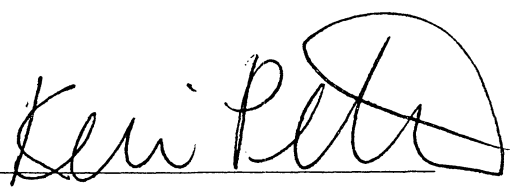
DATED this 11 day of June, 2008.

  
\_\_\_\_\_  
SCOTT P. CARD  
Attorney for Respondent

**MAILING CERTIFICATE**

I certify that I mailed the foregoing postage prepaid this 12 day of June, 2008 to the following:

Clark R. Nielsen  
Kathryn J. Steffey  
SMITH HARTVIGSEN, PLLC  
215 South State Street, Suite 650  
Salt Lake City, UT 84111

  
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## Tab C

4<sup>TH</sup> JUDICIAL DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY  
2008 JUN 24 P 3: 21

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**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

VALERIE J. CONNELL,	AMENDED DECREE OF DIVORCE
Plaintiff,	
vs.	CASE NO. 024400765
HAROLD G. CONNELL,	DATE: 29 May 2007
Defendants.	Judge Claudia Laycock
	Division 3

This matter came before the Court for trial on November 22 and December 8, 19 and 20, 2006. Petitioner was present and represented by counsel, Douglas B. Thayer and Nancee Tegeder. Respondent was present and represented by counsel, Scott P. Card. Although there is also a protective order case pending (Case No. 064401019) between the parties, it is a separate matter and will not be addressed as part of this divorce case. The Court having heard evidence, having reviewed the file and the pleadings herein, and having entered its Findings of Fact and Conclusions of Law now hereby enters the following Decree of Divorce.

**DECREE OF DIVORCE**



## FACTS

1. Valerie J. Connell (“the petitioner”) and Harold G. Connell (“the respondent”) were married in November 22, 1986.

2. At the time of the marriage, petitioner had one daughter, Heather Stacey Connell, born August 23, 1982. Respondent adopted Heather in 1990.

3. The parties also had six biological children during the course of the marriage: Meaghan Tovey Connell, born October 22, 1987; Spencer Ward Connell, born January 16, 1991; Cameron Wenger Connell, born October 17, 1993; Madison Evans Connell, born August 19, 1995; Cassidy Ford Connell, born December 23, 1997; and Caitlyn Phelps Connell, born April 8, 2000.

4. In 2001 the parties separated several times from the beginning of May through the summer. They separated on permanent basis in the beginning of Oct 2001.

5. The petitioner filed a petition for divorce on April 4, 2002.

6. Judge James R. Taylor signed an order bifurcating the proceedings and granting the petitioner a divorce on September 12, 2005.

7. On October 14, 2005—during the pendency of this divorce action--the respondent filed a bankruptcy petition in the United States Bankruptcy Court for the District of Utah (“Bankruptcy Court”) (case no. 05-39070).

8. Together the parties own a home at 865 East Cascade Drive, Orem, Utah. On

September 8, 2001, their monthly mortgage statement showed a balance owing of \$163, 562.45, while on September 8, 2001, the balance was \$163,562.45. Shortly before the time of trial--September 11, 2006--the balance was \$151,982.91.

9. Since October 2001 the petitioner has made all of the monthly payments on the home--a total of \$64,700.00.

10. The parties purchased the home for \$175,000.00 in 1995, at which time the home had 3 finished bedrooms and 2 partially finished bedrooms.

11. During the marriage the respondent attempted to finish portions of the homes, including putting up, taping and mudding sheetrock, adding electrical outlets, framing closets, and working on, at least, one bathroom addition. He did the work himself, but was not a licensed contractor.

12. After the respondent moved out, the petitioner added built-in shelves and hanging bars in a bedroom, finished some of the electrical work, added all new framing around the windows and trim, texturized and painted some of the walls, re-did some of the drywall, and fixed some problems in one bathroom.

13. She also installed an intercom system (\$2,413.36, May 3, 2002), installed an outdoor shed \$425.00, July 6, 2004), replaced the furnace and the water heater (\$3,519.00, November 13, 2003)), and replaced the shake roof with an asphalt-shingled roof (\$10,752.00, September 9 and 13, 2005), installing "Sola tubes" (\$433.47, October 12, 2005). She also did

other types of repair and home maintenance, as found in Exhibits 3 and 4.

14. A second mortgage or line of equity credit was taken out by the parties in January 2001 for the purpose of refinancing the RV and purchasing the Twin Lab stock. By stipulation of the parties at a hearing on May 7, 2002, the parties were ordered to sell the Twin Lab stock and use the proceeds to fix the RV's transmission so that the RV could be sold, using the remainder of the proceeds to pay on the line of credit. The proceeds from the RV were to be applied to the line of credit, as well.

16. The respondent paid \$1,200 to repair the RV transmission; that sum did not come out of the stock proceeds. The RV was eventually sold for \$4,000, but the respondent gave the money to his attorney, who later gave the money to his bankruptcy trustee.

17. The respondent made the payments on the line of credit until October 2005; the petitioner has been making the payments since then. The debt balance is now approximately \$19,000.

18. The Twin Lab stock (10,000 shares) was purchased in March 2001 by the parties at the price of \$1.3125 per share for a total, minus commissions, of \$13,425.00. Its highest value was in April 2001, when it shot up to \$2.6400 per share, for a total value of \$26,400.00. It then began its decline in value, which continued until the parties sold the stock on March 3, 2003 for a value of \$1,209.46. At the time of the May 2, 2002 hearing, the approximate value of the stock was \$7,900, while at the time the order was signed on June 10, 2002, the approximate value of

the stock was \$4,400.00.

19. Although the respondent changed the password to the account, the petitioner did nothing herself—other than several phone calls—to get access to the account or to sell the stock herself.

20. At the hearing on May 7, 2002 the parties also stipulated that the Novell stock purchased at the same time as the Twin Lab stock was awarded to the petitioner as her sole and separate property and that the parties were mutually restrained from dissipating, encumbering, or hiding assets.

21. In May 2002, the respondent was ordered to maintain health insurance on the petitioner and the minor children during the pendency of this action. In October 2005, the respondent cancelled the petitioner's health insurance. The children were also not covered for a time after April 30, 2006.

22. The respondent failed to pay \$1,017.84 in health insurance premiums for August through November 2006. This court had previously entered judgments for other health insurance premiums not paid by the respondent.

23. In May 2002 the respondent was ordered to maintain car insurance on all of the parties' vehicles. From May 5, 2006 through the time of trial, the respondent failed to pay \$85.63 in car insurance premiums.

24. In May 2002 each party was ordered to pay one-half of all unreimbursed medical

and dental expenses, commencing October 23, 2001. From May 2006 through the time of trial, the respondent failed to pay the petitioner \$82.50 for one-half of unreimbursed medical expenses.

25. In May 2002 the Court temporarily awarded the respondent the GMC truck and the LaSalle trailer. During the pendency of this action, the respondent sold the GMC truck for \$3,500.00 and LaSalle trailer for approximately \$1,500.00.

26. During 2003 the petitioner's average monthly child-care cost was \$1,116.67, with the respondent's average monthly share amounting to \$558.33.

27. During 2004 the petitioner's average monthly child-care cost was \$1,601.83, with the respondent's average monthly share amounting to \$800.92.

28. During 2005 the petitioner's average monthly child-care cost was \$1,503.91, with the respondent's average monthly share amounting to \$751.95.

29. During 2006 petitioner's average monthly child-care cost was \$1,246.60, with the respondent's average monthly share amounting to \$623.30.

30. The petitioner travels for her employment approximately once per month for 3-5 days.

31. The petitioner spends approximately \$1,194.76 per month on her mortgage payments, \$84.75 on maintaining the residence, \$461.84 on food and household supplies, \$104.15 on utilities, \$207.93 on clothing, \$98.06 on medical and dental, \$1,200.96 on child care, \$314.20 on education, \$107.28 on entertainment, \$45.05 on grooming, \$136.51 on gifts, \$710.60

on donations, \$377.15 on auto expenses, \$1,900.00 on installment payments and \$87.74 on computer expenses. She also voluntarily donates \$710.60 per month to the LDS Church.

32. The petitioner currently works full-time and makes approximately \$6,669 gross per month in income. She began her new job in November 2003.

33. At the time of the parties' separation, they were living only on the respondent's income.

34. The respondent worked for the LDS Church from approximately June 2001 through October 2003. When he stopped working for the LDS church, he was earning approximately \$2,574.00 gross per two-week pay period, or \$5,577.00 gross per month (\$66,924.00 per year).

35. The respondent worked for BYU from October 2003 through February 17, 2006. Before the respondent was terminated from his position at BYU, he grossed approximately \$5,996.00 gross per month (\$71,952.00 per year). See Trial Exhibit 23 at p.5.

36. The respondent voluntarily resigned from BYU, because he failed to maintain an LDS temple recommend as required for employment. He lost his temple recommend because he was excommunicated.

37. The respondent began his current employment with Medicity in May 2006, where he earns \$5,000.00 gross per month (\$60,000.00 per year).

38. The respondent married Brenda Louise Bruni in October 2005.

39. The respondent pays his second wife's monthly house payment of \$752.00. He also

pays her \$1,500.00 per month to help with living expenses.

40. Ms. Bruni's daughter, Sarah, has always lived with them. Her 18<sup>th</sup> birthday was in April, 2006, at which time Ms. Bruni's child support for Sarah ended. Sarah pays her mother \$360.00 per month (and sometimes less) to help with expenses.

41. Ms. Bruni's older daughter and infant child also lived with them from February through April 2006, as did Ms. Bruni's mother from January or February 2006. Her mother has helped her financially at times. Her mother has terminal cancer.

42. In 1997 the petitioner received a gift of CINTAS stock from her uncle; she placed the CINTAS stock in a private and separate account.

43. The respondent accused her, during a session of marriage counseling, of not being a "team player"--due to the separate CINTAS stock account. Because of that accusation, she felt coerced to place the CINTAS stock into a joint account in January 2001.

44. The respondent's name did not appear on the account's monthly statements until April 2001; however, the respondent had access to the account as early as January 2001.

45. In April 2001 the respondent borrowed against the CINTAS stock to purchase other *stock without the petitioner's permission.*

46. Subsequently, on July 19, 2001 the respondent sold the CINTAS stock for \$31,784.98. However, the parties only received approximately \$18,000 in cash, as the remaining amounts had been used by the respondent to purchase other stocks.

47. At approximately the same time the parties separated, the respondent took out a \$1,900.00 quick draw loan. The petitioner never saw this money, but she ultimately paid this loan back.

#### **I. BANKRUPTCY ISSUES RELATED TO THIS DIVORCE ACTION**

48. On October 14, 2005, the respondent filed a bankruptcy petition in the United States Bankruptcy Court for the District of Utah ("Bankruptcy Court") (Case No. 05-39070). The petitioner's claims for alimony, support and/or maintenance will receive a priority payment as part of distribution of the estate in the bankruptcy case.<sup>1</sup> Under Utah case law, said claims may also include attorneys' fees spent in pursuit of payment for alimony, support, maintenance, custody and/or visitation.<sup>2</sup>

49. Therefore, the petitioner is seeking to have this court categorize as many as possible as pre-bankruptcy-petition-filing judgments and as an award for alimony, support or maintenance (or fees incurred in obtaining these judgments) in order to protect her claims in Bankruptcy Court.

50. Further, the Bankruptcy Court will not consider any claims against the respondent

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<sup>1</sup> As of the morning of the first day of trial, the bankruptcy court retained jurisdiction over the marital home only, leaving all personal property issues and other debt issues to this court. Therefore, this court makes no decision regarding the disposition of the parties' equity in the marital home.

<sup>2</sup>See *Seals v. Condie*, 139 P.3d 271, 277 (Utah App. 2006) ("Those determinations 'rest[] primarily in the sound discretion of the trial court.'" Cites omitted.).



that were incurred after his bankruptcy petition was filed, i.e., child support arrearages arising after October 2005. The Bankruptcy Court will only deal with claims against the respondent that arose prior to the respondent's filing of his bankruptcy petition.

## **II. BIFURCATION OF THE DIVORCE AND DATE OF THE DECREE**

51. On April 28, 2005, Respondent filed a Motion to Bifurcate Divorce and an Affidavit in Support. On May 16, 2005, Commissioner Patton denied Respondent's Motion to Bifurcate. On September 1, 2005, Respondent filed a Motion to Reconsider Ruling for Bifurcated Divorce. However, as so many attorneys do, the respondent simultaneously submitted a proposed Bifurcated Divorce Decree. Judge James R. Taylor inadvertently signed the Bifurcated Divorce Decree on September 12, 2005.

52. Subsequently, on October 7, 2005, the parties came before Judge Taylor, who heard arguments and granted the respondent's motion to reconsider the commissioner's ruling. Later in the hearing, Judge Taylor discovered the signed Bifurcated Divorce Decree in the file; he then reprimanded the respondent's attorney for filing a motion to reconsider, instead of an objection to the commissioner's ruling. Nevertheless, he left his decision in place and granted the motion to reconsider. He did not order either party to prepare a new order of bifurcation, as neither attorney brought up that particular subject. There was absolutely no discussion between the attorneys and the court regarding a change of date for the decree.

53. This court can now only assume that Judge Taylor was content to leave the

previously signed order in place. Therefore, this court will not amend the date nunc pro tunc (as requested by the petitioner), but will leave the date of divorce as September 12, 2005.

### **III. CUSTODY AND VISITATION**

54. Pursuant to an Order and Stipulation entered on July 28, 2006, the respondent shall not exercise or attempt to exercise visitation with the minor children unless the visitation time is supervised by a third party professional visitation supervisor such as ACAFS or WillWin. Due to the prior sexual abuse issues involving the respondent and the children, the respondent has permanently waived his right to have unsupervised visitation. Thus, the petitioner is awarded sole legal and physical custody of the minor children.

55. Further, while the respondent may attend public functions in which the minor children are involved, such as plays or sporting events, he is not allowed to visit with the children before, during or after the events. Also, the respondent may not attend the church where the children are attending.

56. The only remaining issue at trial regarding visitation concerned telephonic visitation. Pursuant to the petitioner's testimony, the parties had previously agreed to the Guardian ad Litem's recommendation that the respondent be allowed to call the children between 5:00 p.m. and 8:00 p.m. on Tuesdays and Thursdays. The respondent did not dispute these times for telephonic visitation, nor did he dispute that he had previously agreed to these times. Further, the Guardian ad Litem recommended that the children should be allowed to call the respondent

whenever they want. Neither party disputed this recommendation. In fact, when questioned at trial, the respondent agreed with the recommendation.

57. Accordingly, the respondent's telephonic visitation shall be set on Tuesdays and Thursdays between 5:00 p.m. and 8:00 p.m. or whenever the children want to call the respondent.

#### **IV. MARITAL HOME**

58. Due to the respondent's pending bankruptcy, this court does not have jurisdiction to award either party equity in the marital home. Petitioner urges this court to make a finding that mortgage payments and home improvement expenses she has paid constitute family support and/or maintenance, because it was necessary to provide a habitable home for the children. Further, she urges the court to enter a judgment against the respondent for the amount that the petitioner spent on the mortgage and improvements.

##### **A. First Mortgage**

59. Petitioner has lived in the family home with the children and has made the payments on the first mortgage since the parties separated in October 2001. In addition, in May 2002 the court ordered the petitioner to make the first mortgage payments. See May 2002 Order at ¶ 7. On September 8, 2001, the debt on the marital home was \$163,562.45. See Trial Exhibit 1. On December 29, 2001 the debt on the marital home was \$162,837.44. Id. Shortly before the time of trial--September 11, 2006--the debt on the marital home was \$151,982.91. Id. Thus, in construing these numbers in a light most favorable to the respondent, the petitioner has paid

approximately \$10,855 in principal since the parties separated ( $\$162,837 - \$151,982 = \$10,855$ ).

60. Further, the petitioner testified that she has spent approximately \$64,700 on principal and interest payments from the time the parties separated until the time of trial. Thus, Petitioner has spent approximately \$53,145 on interest payments for this time period ( $\$64,700 - \$10,855 = \$53,845$ ).

61. Since this court cannot award her any equity in the marital home, the petitioner requests that this court enter a judgment against the respondent for the \$64,700.00 she has spent on principal and interest payments for the first mortgage since October 2001. Moreover, the petitioner requested that this court characterize said judgment as family support and/or maintenance since providing a home for the children is part of supporting or maintaining the family. The respondent did not dispute that the petitioner made such payments.

62. This court agrees with the respondent that the petitioner's argument is without merit. The petitioner has received the benefit and comfort of living in the home and should not be granted judgment against the respondent for having made the payments on the home. To grant her a judgment for the \$64,700 that she paid toward the mortgage would be the equivalent of granting her—or the respondent, for that matter, were the tables turned—credit and a judgment for paying rent, utilities, phone bills, light bulbs, toilet paper, and all other household necessities. Although all of those bills and items could be characterized as family support and/or maintenance (since the children need the benefit of all of those bills and items), the court cannot

find any legal precedent for such a ruling.

63. In addition, she received (or should have received) support in the way of alimony and child support. She will receive a judgment for any such support not paid by the respondent during the pendency of this action. To grant her a judgment for unpaid alimony and child support, plus her mortgage payments, would, in effect, grant her judgment twice and force the respondent to pay twice. Such a ruling would be outside the bounds of equity.

64. The division of the marital home and any award of equity remains in the domain of the bankruptcy case. This court will not attempt to make any ruling in that regard, other than to note, again, that the petitioner has reduced the principal of the first mortgage by \$10,855.00 since the separation of the parties. No evidence was produced which would enable the court to calculate the reduction of the principal since the time of the bifurcated decree of divorce.

#### **B. Home Improvement**

65. During the marriage the respondent attempted to finish portions of the home, including putting up, taping and mudding sheet rock, adding electrical outlets, framing closets, and working on, at least, one bathroom addition. He did the work himself, but was not a licensed contractor. The parties were, apparently, satisfied to let him attempt these improvements while they were married.

66. After the respondent moved out, the petitioner added built-in shelves and hanging bars in a bedroom, finished some of the electrical work, added all new framing around the

windows and trim, texturized and painted some of the walls, re-did some of the drywall, and fixed some problems in one bathroom.

67. She also installed an intercom system (\$2,413.36, May 3, 2002), installed an outdoor shed \$425.00, July 6, 2004), replaced the furnace and the water heater (\$3,519.00, November 13, 2003)), and replaced the shake roof with an asphalt-shingled roof (\$10,752.00, September 9 and 13, 2005), installing “Sola tubes” (\$433.47, October 12, 2005). She also did other types of repair and home maintenance, as found in Exhibits 3 and 4.

68. The petitioner claims that the respondent should pay the amount of \$21,885.33 for the work that she did or had done. See Trial Exhibits 3 and 4. However, this court does not believe that (1) the respondent should pay for all of the appropriate costs, but that the petitioner should share in the cost; and (2) that the respondent should pay for improvements and maintenance costs that were optional.

69. The court finds that the roof replacement (\$10,752.00) and the furnace and water heater replacements (\$3,519.00) were necessary and appropriate, as well as the garage door opener (\$298.00). However, the installation of an intercom system (\$2,413.36) was not necessary and the respondent should not have to share in that cost. Id. There were many items and costs in Exhibit 4 which were unexplained or appeared to be for minor repairs. This court views the normal, ongoing maintenance and repairs as part of the burden born by the party who has the benefit of living in the home, pending the conclusion of the divorce action.

70. Therefore, this court is not persuaded that the respondent should have to bear all of the costs, as outlined in Exhibit 4, nor should he have to pay for costs beyond those larger-ticket items which improved the value of the home.

71. Therefore, the parties shall share equally the following costs: roof replacement, \$10,752.00; furnace and water heater, \$3,519.00; and garage door opener, \$298.00. The court notes that the petitioner paid for the roof replacement on or about September 20, 2005, which was when the petitioner paid the balance of the roofing cost. She paid for the furnace and water heater on November 13, 2003, two years before the decree was signed. She paid for the new garage door opener on January 6, 2004. All of these costs were incurred before the filing of the bankruptcy action.

72. The total amount to be shared by the parties is \$14,569.00. Each party will pay one-half or \$7,284.50. The respondent is ordered to pay a judgment in the amount of \$7,284.50 to petitioner for his share of the improvements to the home. For the purposes of the bankruptcy proceeding, this court characterizes this judgment as family support and maintenance, because improvement and maintenance expenses were necessary to provide the children with a habitable home. All of the \$7,284.50 was incurred before the filing of the bankruptcy action.

### **C. Home Equity Line of Credit/Second Mortgage**

73. A line of credit secured by a mortgage on the marital home was taken out by the parties in January 2001 for the purpose of refinancing the RV and purchasing the Twin Lab

stock. By stipulation of the parties at a hearing on May 7, 2002, the parties were ordered to sell the Twin Lab stock and use the proceeds to fix the RV's transmission so that the RV could be sold, using the remainder of the proceeds to pay on the line of credit. The proceeds from the RV were to be applied to the line of credit, as well.

74. The respondent paid \$1,200 to repair the RV transmission; that sum did not come out of the stock proceeds. The RV was eventually sold for \$4,000. In an order signed on January 5, 2005 (from a December 2, 2004 hearing), the Court ordered the proceeds from the RV sale to be placed with the respondent's former attorney, James Faust, to hold in trust "until such time as the Court makes additional orders, or the parties stipulate in writing to a dispersal of the funds."

75. At the October 7, 2005 hearing before Judge Taylor, the parties stipulated that the RV proceeds should be applied to the line of credit. The respondent was present, according to the court's minute entry. However, the respondent gave the \$4,000 to his attorney, James Faust, then retrieved the money, and then gave the money to his new attorney, Theodore Weckel. The court has no evidence before it that the respondent gave his new attorney any instructions regarding the disposition of the money. Mr. Weckel gave the \$4,000 to the bankruptcy trustee. The court does not find the respondent in contempt for the transfer of the \$4,000 to the bankruptcy trustee, although the court finds that the respondent should pay an extra \$2,800 toward the balance owing on the line of credit (\$4,000 minus the \$1,200 to fix the RV).

76. The respondent made the payments on the line of credit until October 2005; the



petitioner has been making the payments since then. The debt balance is now approximately \$19,000.

77. The Twin Lab stock (10,000 shares) was purchased in March 2001 by the parties at the price of \$1.3125 per share for a total, minus commissions, of \$13,425.00. Its highest value was in April 2001, when it shot up to \$2.6400 per share, for a total value of \$26,400.00. It then began its decline in value, which continued until the parties sold the stock on March 3, 2003 for a value of \$1,209.46 and applied the proceeds to the line of credit. At the time of the May 2, 2002 hearing, the approximate value of the stock was \$7,900, while at the time the order was signed on June 10, 2002, the approximate value of the stock was \$4,400.00.

78. Although the respondent changed the password to the account, the petitioner did nothing herself—other than several phone calls—to get access to the account or to sell the stock herself. Both parties had the power to sell the stock, while neither party had the power to control the stock market and the value of the stock. Although the stock's value declined from May 2001 to the time of the May 2002 hearing, neither party sold the stock while its value remained higher than the original purchase price. By the time of the May 2002 hearing, the stock was already worth less than the parties had paid for it. Unfortunately, neither party possessed the prophetic powers necessary to out-guess the stock market, and neither party moved to sell the stock at an advantageous moment. The court holds neither party responsible for the low value of the stock when it was finally sold and awards neither party a judgment on this issue.

79. Therefore, the court divides the remaining balance on the line of equity equally between the parties (\$9,500 each), but orders the respondent to pay an extra \$2,800 for the proceeds of the RV which were not paid toward the line of credit. The court orders the respondent to pay a judgment in the amount of \$12,300.00 for his share of the remaining balance on the line of credit.

80. The court rejects a finding of contempt against the respondent with regard to either the Twin Lab stock or the RV proceeds. All of the \$12,300.00 judgment was incurred before the filing of the bankruptcy action.

## **V. HEALTH INSURANCE**

### **A. Respondent's Failure to Maintain Health Insurance**

81. In May 2002, Respondent was ordered to maintain health insurance on the petitioner and the minor children during the pendency of this action. See May 2002 Order at ¶ 4. However, in October 2005, the respondent cancelled the petitioner's health insurance. See Trial Exhibit 6.

82. The court already found that the petitioner made a prima facie case for contempt regarding the respondent's failure to maintain health insurance for the petitioner as ordered by the court. See Petitioner's May 2006 Order to Show Cause and Order on May 2006 hearing. Respondent reserved his right to argue at trial "that he should not be held in contempt, notwithstanding Petitioner making her prima facie case." Id.

83. Although the respondent testified at trial that he cancelled the petitioner's health insurance because he was planning to remarry, the Order states he was required to maintain her health insurance "during the pendency of this action"--not until he remarried. The respondent further testified that he was not aware of any changes to this Order. Thus, the respondent failed to meet his burden of showing why he should not be held in contempt for failing to maintain the petitioner's health insurance.

84. In addition, it is undisputed that the respondent lost insurance for the children on April 30, 2006. See also Trial Exhibit 6. The petitioner requested that the respondent be found in contempt for failing to maintain insurance on the children as ordered by the court. The respondent did not provide any evidence that he provided the children with new insurance immediately following the loss of coverage on April 30, 2006. In fact, the respondent admitted that he did not inform the petitioner about her COBRA options for the children when he learned about them in February.

85. Accordingly, the court finds the respondent in contempt for failing to maintain health insurance on the petitioner and the children. The petitioner is awarded her attorneys' fees *and costs incurred in obtaining this finding*. Further, *this court makes a finding that maintaining health insurance is necessary for family support and maintenance in order to keep the children in good health.*

#### **B. Respondent's Failure to Pay Health Insurance Premiums**

86. Respondent was ordered to pay all costs of premiums associated with health insurance. See May 2002 Order at ¶ 4. The petitioner testified that she obtained health insurance once she learned that the respondent had failed to maintain said insurance, yet the respondent failed to pay anything toward these premiums. On June 16, 2006, the court ordered the respondent to pay \$1050.73 in medical insurance premiums owed as of May 5, 2006.<sup>3</sup> See June 16, 2006 Order at ¶ 1. In addition, on August 28, 2006, the court ordered the respondent to pay health insurance premiums for June and July 2006, which totaled \$509.00.<sup>4</sup> See August 28, 2006 Order at ¶ 2. See also Trial Exhibit 5.

87. At trial, the petitioner testified that respondent owed her an additional \$1,017.84 in health insurance premiums for August through November 2006. Petitioner requested that the court enter a judgment against respondent for this amount. The respondent failed to provide any evidence that he had been paying insurance premiums to the petitioner.

88. Further, the petitioner requested that the respondent be found in contempt for his failure to pay any medical insurance premiums since insurance was cancelled for the petitioner and the children. Again, the respondent failed to provide any evidence that he had been paying insurance premiums during this time period.

89. Accordingly, a judgment will enter against the respondent for \$1,017.84 for unpaid

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<sup>3</sup>The respondent objected to the commissioner's ruling, but the objection was overruled by Judge Taylor.

<sup>4</sup>The court can find no objection in the file to this ruling.

health insurance premiums. In addition, the court finds the respondent in contempt for failing to pay insurance premiums after the petitioner's and the children's insurance was cancelled. Further, these judgments and any fees incurred in obtaining these judgments will be characterized as family support and/or maintenance, because health insurance premiums are necessary to keep the children in good health. Moreover, the petitioner is awarded her attorneys' fees and costs incurred in obtaining these judgments.

### **C. Future Health Insurance**

90. The petitioner testified that she would like to be the primary insurer for the children because of the difficulties she has faced in obtaining insurance coverage information from the respondent. The petitioner also requested that the respondent be required to pay one-half of the children's health insurance premiums under her plan. The court finds that these are reasonable requests, as the respondent has failed in the past to insure the children and to notify the petitioner when coverage ceased. It will be more beneficial to the children for the petitioner to be in charge of the insurance coverage and their health care. The court orders that the petitioner's insurance will be the primary coverage for the children and that the respondent will pay one-half of the cost.

91. If the respondent can obtain a secondary health insurance, which would, in effect, cover all health costs for the children which are not covered by the petitioner's insurance, the petitioner will pay for one-half of the cost of such insurance. Otherwise, the parties will simply

pay one-half each of all uncovered health care costs for the children.

## **VI. CAR INSURANCE**

### **A. Respondent's Failure to Maintain Car Insurance**

92. In May 2002, the respondent was ordered to maintain car insurance on all of the parties' vehicles. See May 2002 Order at ¶ 5. The respondent testified that he was not aware of any changes to this Order. However, the petitioner testified that beginning in February 2005 the respondent failed to make full car insurance premium payments. Thus, on June 16, 2006, the Court ordered the respondent to pay \$1,063.11 in car insurance premiums owed as of May 5, 2006. See June 16, 2006 Order at ¶ 1.

93. From the time of this judgment until the time of trial, the respondent failed to pay \$85.63 in car insurance premiums. The respondent failed to provide any evidence to demonstrate that the Order to maintain car insurance had changed or that he had, indeed, made all the necessary payments. In addition, the court finds no reason to modify the previous order.

94. Accordingly, the petitioner is granted a judgment against the respondent in the amount of \$85.63 for car insurance premiums. The court also finds that car insurance premiums are necessary for the support and/or maintenance of the family to allow them to get around and live their lives. Further, pursuant to the petitioner's request, the court finds the respondent in contempt for failing to obey this court order regarding car insurance. The court awards the petitioner her attorneys' fees and costs incurred in obtaining this judgment.

## **B. Future Car Insurance**

95. The petitioners requests that the court order the respondent to pay for one-half of any future car insurance premiums for the children. The court agrees with the respondent that driving is a privilege and that such support is not mandatory for minors. This request is denied.

## **VII. MEDICAL EXPENSES**

### **A. Respondent's Failure to Pay Medical Expenses**

96. In May 2002, each party was ordered to pay one-half of all unreimbursed medical and dental expenses, commencing October 23, 2001. See May 2002 Order at ¶ 4. The respondent testified that to his knowledge this Order has not been changed. In September 2004, the petitioner was awarded judgment against the respondent in the amount of \$231.00 for his share of medical costs. See September 2004 Order at ¶ 4. In addition, on June 16, 2006, the court ordered the respondent to pay \$1,589.60 for his share of medical expenses as of May 5, 2006. See June 16, 2006 Order at ¶ 1. The court found the petitioner made a prima facie case for the respondent's contempt in failing to pay medical expenses for 2003 through 2005. See May 2006 Order at ¶ 5.

97. Also, the petitioner testified that currently the respondent owes her \$82.50 for one-half of unreimbursed medical expenses from May 2006 to the time of trial. The respondent failed to provide any evidence that he did not owe this amount or that he had paid this amount. Petitioner requested the Court to find the respondent in contempt for failing to pay medical

expenses in 2006.

98. Accordingly, a judgment shall enter against the respondent in the amount of \$82.50 for unreimbursed medical expenses and the court finds him in contempt for failing to pay such. Further, all judgments awarded to the petitioner in this case regarding unreimbursed medical expenses, including attorneys' fees and costs incurred in obtaining these judgments, shall be classified as family support and/or maintenance because such expenses are necessary for the children's health. Moreover, the petitioner is awarded her attorneys' fees and costs incurred in obtaining these judgments. Also, since the September 2004 order entered before the respondent filed for bankruptcy, the \$231.00 shall be classified as a pre-bankruptcy petition claim. In addition, \$1,197.18 of the June 2006 judgment shall be classified as a pre-bankruptcy petition claim.

#### **B. Future Medical Expenses**

99. If the respondent obtains secondary insurance, which would in effect, cover all health costs for the children which are not covered by the petitioner's insurance, the petitioner will pay for one-half of the cost of such insurance. Otherwise, each party shall be responsible for one-half of all future unreimbursed medical and dental expenses reasonably incurred by the minor children, including co-pays, deductibles and prescriptions, which are not paid by a medical insurance carrier.

100. If the respondent does obtain secondary insurance, the respondent must pay his



share of the bills within 30 days after the secondary insurance rejects any costs. If the respondent chooses not to obtain secondary insurance, then the parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment. Within 30 days of receiving written verification of medical expense, the parent receiving verification shall pay one-half of the medical expense.

### **VIII. PERSONAL PROPERTY**

101. On May 7, 2002, the court temporarily awarded the respondent the Subaru, GMC truck and LaSalle trailer. See May 2002 Order at ¶ 10. The respondent testified that he understood this court order and that he was not aware of any changes to this order. Nonetheless, the respondent admitted that he sold the GMC truck and LaSalle trailer in violation of this Court order. The respondent sold the GMC truck for approximately \$3,500.00 and the LaSalle trailer for approximately \$1,500.00.

102. The court awards the petitioner a \$2,500.00 judgment against the respondent in the amount of one-half of the proceeds from the sale of the truck and trailer. Further, the petitioner had already established a prima facie case of the respondent's contempt for disposing of marital assets. Respondent failed to provide any evidence that the May 2002 order had been modified or should have been modified. Thus, this court finds the respondent in contempt for selling these items of marital personal property. Moreover, the petitioner is awarded her attorneys' fees and costs incurred in obtaining this judgment.

### **B. Exercise Equipment and Entertainment Center**

103. In May 2002 the court temporarily awarded the respondent some exercise equipment and an entertainment center that were marital property. During the petitioner's testimony regarding these items, the court received the impression that these items were of great value, although the petitioner offered no evidence as to their value. Much to the court's surprise, the only evidence as to value came from the respondent, who testified that he purchased the used exercise equipment at an auction through Alpine School District at \$20.00 per item for a total of \$180.00. It would have been worth even less than that at the time the parties separated. His testimony was that the entertainment center was worth \$75.00.

104. The court is stunned at the time, effort, and attorney's fees that the petitioner expended in arguing this issue. These items were not worth an hour's time in attorney's fees. The court does not find the defendant in contempt for leaving the exercise equipment in Montana or giving the cheap entertainment center to his new wife. The court will not award attorney's fees for this issue.

### **D. Remaining Marital Personal Property**

105. At the beginning of this trial, the Bankruptcy Court retained jurisdiction over the parties' personal property. However, on the third day of trial, December 19, 2006, the trustee in the respondent's bankruptcy case abandoned all of the personal property. See Trial Exhibit 27. Thus, this court obtained jurisdiction over the remaining marital personal property.

106. Despite petitioner's testimony that the respondent has had multiple opportunities to go through the home and take whatever property he wanted, the court finds that, given the incredible acrimony between these parties and the existence of a protective order which prevents the respondent from going near the marital home, the respondent was wise in waiting for trial to request the return of just a few items.

107. Therefore, the court orders the petitioner to return the following items to the respondent: a punching bag, a DeWalt compound miter saw, a DeWalt router, a Milwaukee Sawzall, an electric planer, a 24-foot ladder, and the sewing machines which were gifts from his grandmother. The attorneys for the parties can aid in transferring these items from one party to the other.

## **IX. CHILD CARE EXPENSES**

### **A. Respondent's Failure to Pay Child-Care Expenses**

108. In May 2002, each party was ordered to pay one-half of any work-related daycare expenses for the children. See May 2002 Order at ¶ 14. In September 2004, the petitioner was awarded judgment against the respondent for his one-half share of daycare expenses, including \$4,560.00 for the year 2003 and \$3,030.00 for January 1, 2004 through August 31, 2004. See September 2004 Order at ¶¶ 5-6. In addition, on August 28, 2006, the court ordered the respondent to pay \$1,000.00 in child-care costs for the months of June and July 2006. See August 28, 2006 Order at ¶ 2. Of course, these judgments still stand, minus the garnishments of

\$8,425.39 already taken by the petitioner.

109. In September 2004 the respondent was ordered to pay \$340.00 per month during the school year and \$500.00 per month during the summer months, for a total amount of \$4,560.00 per year.<sup>5</sup> Commencing with September 2004 and ending November 22, 2006 (the first day of trial), the respondent owed \$1,360.00 for 2004; \$4,560.00 for 2005; and \$4,136.00 for 2006 for a total owing of \$10,056.00. Judgment has already been given to the petitioner for June and July 2006 for \$1,000.00, leaving a total of \$9,056.00 for the court's calculations.

110. According to Exhibit 16, from October 2004 through November 22, 2006 the respondent paid \$7,280.00 (as well as other arrearages through garnishments).

#### **B. Judgment and Contempt**

111. The court grants judgment to the petitioner for the amount of \$1,776.00 in unpaid child-care expenses, pursuant to the September 2004 order of \$340.00 and \$500.00, for the months and years listed above. The court finds the respondent in contempt for his failure to pay the \$1,776.00 pursuant to the September 2004 order and awards petitioner her reasonable attorney's fees for this issue.

112. This judgment<sup>6</sup> for child-care expenses and attorneys fees incurred in obtaining

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<sup>5</sup>At that time both parties reserved the right to argue as to the reasonableness of that order.

<sup>6</sup>In the petitioner's suggested memorandum decision, her calculations included her figures for the larger amount she seeks for child-care expenses, as well as the past judgments and past garnishments. The court will not attempt to run those calculations at this time, as those judgments and garnishments were not truly before the court at trial. However, for purposes of

judgments for child-care expenses shall be classified as family support and/or maintenance, because it directly relates to taking care of the children. Also, pursuant to the petitioner's testimony and Exhibit 16, \$978.00 of this judgment shall be classified as a pre-bankruptcy petition judgment—the total due from September through December 2004 of \$1,360.00, plus January through October 14, 2005 of \$3,710.00, minus the amount the respondent paid during this time period (\$1,020, plus \$3,072 for a total of \$4,092.00.<sup>7</sup>

**C. Petitioner's Request for Increased Child-Care Expenses, Past and Future**

113. The court has looked at the petitioner's testimony and Exhibit 16 very carefully and makes the following observations:

- a. During 2003 the petitioner's average monthly child-care cost was \$1,116.67, with the respondent's share amounting to \$558.33.
- b. During 2004 the petitioner's average monthly child-care cost was \$1,601.83, with the respondent's share amounting to \$800.92.
- c. During 2005 the petitioner's average monthly child-care cost was \$1,503.91,

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the bankruptcy action, the court will find that all judgments awarded to the petitioner for amounts incurred before October 14, 2005 should be considered pre-bankruptcy in nature and should also be classified as family support and/or maintenance.

<sup>7</sup>Exhibit 16 failed to provide monthly amounts paid by the respondent, so the court has assumed some logical facts in order to bring finality to this issue. The court has arrived at the September through December 2004 credits for the respondent by noting that the \$1,020 paid in 2004 is exactly 3 months at \$340.00. Apparently, the respondent finally made some payments after Commissioner Patton lowered the amounts. As for 2005, the court simply took the annual total of \$4,560.00, divided it by 12, and multiplied that result by 9.5 months.

with the respondent's share amounting to \$751.95.

d. During 2006 petitioner's average monthly child-care cost was \$1,246.60, with the respondent's share amounting to \$623.30.

e. The petitioner urges the court to award her an ongoing child-care amount of \$400 per week (\$20,000 per year/\$1,666.67 per month/\$833.34 respondent's share)<sup>8</sup> for "nanny" care, which she deems necessary, because she travels approximately once per month for 3-5 business days.

f. The petitioner now works at a job which brings her approximately \$80,000.00 annual salary, which is more than the respondent now makes.

114. The parties' minor children are now 16, 13, 12, 9 and 7 years of age; the two older children are 19 and 24 years of age.<sup>9</sup> The petitioner's argument is that, because of her occasional travel for work, the respondent should help her pay for full-time nanny care. The court finds this unreasonable. All of the children are in school full-time, so there is no need for full-time care during the school year, and only two of the children are still in elementary school. The older children certainly can be expected to help with the younger children; indeed, the oldest boy does not have football practice after school year-round. The infrequency of the petitioner's work-related travel does not justify the request that the respondent pay \$833.34 per month for his

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<sup>8</sup>The court calculated this with a 50-week work year.

<sup>9</sup>As of the time of this decision—not the time of trial.

share of the child-care expenses. Although the petitioner is correct in asserting that the respondent offered no other reasonable suggested costs for child-care expenses, neither did the petitioner.

115. Therefore, the court finds that the amounts previously ordered are within the realm of reason and also within this court's experience on the bench. The court will order the respondent to pay ongoing child-care expenses of \$340.00 per month during the nine months of the school year and \$500.00 per month during the three months of the summer vacation, for a total of \$4,560.00 per year. With the petitioner paying equal amounts, this should be quite adequate for the children's needs.

## **X. ALIMONY**

### **A. Respondent's Failure to Pay Two Months' Alimony**

116. The respondent was ordered to pay \$230 per month in alimony, beginning April 1, 2002. See May 2002 Order at ¶ 3. At a hearing on May 15, 2006 the parties stipulated that the petitioner made a prima facie case on her order to show cause regarding alimony payments for March and April 2006. See Order and Stipulation signed July 28, 2006 at ¶ 5.

117. At a hearing on June 15, 2006, the respondent failed to present any evidence that he paid these amounts or that he was justified in failing to pay these amounts. Thus, the court makes a finding that the respondent was in contempt for failing to pay two months of alimony payments. On June 15, 2006, the court ordered the respondent to pay \$460.00 in alimony

arrearages incurred as of April 13, 2006. See Order signed July 28, 2006 at ¶ 1. The court awards the petitioner her attorneys' fees and costs incurred in obtaining these judgments.

118. As of the time of trial, the respondent was current on his alimony obligations.

119. The court file is replete with the respondent's early efforts to reduce the temporary alimony obligation of \$230.00 per month. He filed 3 verified motions to have his support orders reduced or adjusted. These motions were finally heard at a hearing on June 24, 2004, at which Commissioner Patton took care of some issues, including child support, but reserved all other matters for trial, including alimony. Therefore, the court finds that the respondent did properly preserve his right to argue for retroactive adjustment (and possible credit) of alimony as of August 6, 2003, which is when the second motion (which mentioned alimony specifically) was filed with the court. Petitioner reserved the same right in May 2002. The court will make any adjustments for retroactivity after determining the correct income to be attributed to the parties.

#### **B. Past and Future Alimony**

120. The petitioner requests that the respondent be ordered to pay future alimony, while the respondent requests that his alimony obligations cease. He has withdrawn his request for alimony from the petitioner. In determining whether to award alimony, the court considers:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;



- (v) whether the recipient spouse has custody of minor children requiring support . . .
- (b) The court may consider the fault of the parties in determining alimony.

U.C.A. § 30-3-5(8).

### **1. The Financial Condition and Needs of Petitioner**

121. The petitioner spends approximately \$1,194.76 per month on her mortgage payments, \$84.75 on maintaining the residence, \$461.84 on food and household supplies, \$104.15 on utilities, \$207.93 on clothing, \$98.06 on medical and dental, \$1,200.96 on child care, \$314.20 on education, \$107.28 on entertainment, \$45.05 on grooming, \$136.51 on gifts, \$710.60 on donations, \$377.15 on auto expenses, \$1,900.00 on installment payments and \$87.74 on computer expenses. See also Trial Exhibit 9.

122. Petitioner also testified that her current net monthly gross income is \$6,669.08. The court notes, with some surprise, that the petitioner declares no exemptions and, thereby, increases the amount of taxes taken from her gross income. Therefore, her net income is an artificially low \$4,121.30. Id. She also voluntarily donates \$710.60 per month to the LDS Church. Therefore, without the inclusion of the church donation, the alimony and child support she is currently receiving, minus deductions and expenses as outlined above, the petitioner is deficient approximately \$2,548.75 per month. Id.

### **2. The Recipient's Earning Capacity or Ability to Produce Income**

123. The petitioner is currently working full-time and makes approximately \$6,669 gross per month in income. Id. The respondent did not provide any evidence that the petitioner

is working below her earning capacity or that she is able to produce more income. Thus, the court finds that the petitioner is able to earn \$6,669 gross per month. At the time of the parties' separation, they were living only on the respondent's income. She began her new job in November 2003.

### **3. The Ability of Respondent to Provide Support**

124. Respondent worked at Novell from August 1998 through approximately June 2001. From January 2001 through about June 15, 2001 he grossed \$47,879.77. See Trial Exhibit 18. Thus, in construing this amount in a light most favorable to the respondent, he grossed approximately \$7,979 per month (\$47,879 for 6 months) while working at Novell.

125. The court finds credible the respondent's testimony that he voluntarily left this employment at Novell for a lower paying job, because he was afraid he would be laid off before finding another job.<sup>10</sup> The court is persuaded by the respondent's argument that the computer industry is volatile with regard to steady employment and that it was reasonable for the respondent to protect his family and his income by finding a new job before being laid off. In addition, this change of employment occurred before the parties' separation and the filing of this divorce.<sup>11</sup> This court refuses to delve into decisions made by the parties before the time of the

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<sup>10</sup>The many reductions in the employee force at Novell through the last decade have been front-page news in this community.

<sup>11</sup>The petitioner's testimony was that she opposed his change of employment, while the respondent testified that it was a mutual decision.

separation, as it is not the duty of this court to revise decisions made by the parties before this court had jurisdiction. Thus, the court makes no finding as to respondent's income at Novell and will not include the income at Novell in its calculations and decision regarding imputation of income.

126. After leaving Novell, the respondent secured employment with the Corporation of the Presiding Bishop ("LDS Church"). He worked for the LDS Church from approximately June 2001 through October 2003. When he stopped working for the LDS church, he was earning approximately \$2,574.00 gross per two-week pay period, or \$5,577.00 gross per month (\$66,924.00 per year). See Trial Exhibit 21.

127. While employed with the LDS church, the respondent was recruited by Brigham Young University ("BYU"). He worked for BYU from October 2003 through February 17, 2006. Before the respondent was terminated from his position at BYU, he grossed approximately \$5,996.00 gross per month (\$71,952.00 per year). See Trial Exhibit 23 at p.5. The respondent voluntarily resigned from BYU, because he failed to maintain an LDS temple recommend as required for employment.<sup>12</sup> He lost his temple recommend because he was

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<sup>12</sup> At the August 24, 2006 hearing before Judge Taylor, the court ordered that the petitioner could depose the respondent regarding the "temple recommend issue." See Order, signed November 13, 2006. The petitioner claims that, due to the respondent's subsequent discovery delays, the petitioner was not able to depose the respondent on this matter.

The petitioner cites a November 2006 Order on Motion for Default Judgment, stating that it "provides that if 'Petitioner is unable to present the necessary evidence based on Respondent's failure to provide necessary evidence through discovery, Respondent will be precluded from defending on such issues.'" The court can not find such order in the file, nor does the court recall

excommunicated.

128. The respondent began his current employment with Medicity in May 2006, where he earns \$5,000.00 gross per month (\$60,000.00 per year).

129. The petitioner urges the Court to make a finding that the respondent has the ability to earn his previous BYU income (\$5,996 per month) since he voluntarily acted in such a way as to cause him to lose his employment. In contrast, the respondent requests that the court use his current income of \$5,000 per month in determining alimony, if any.

130. Pursuant to Utah Code Ann. § 78-45-7.5(7)(a), if the respondent is voluntarily unemployed or underemployed, income may be imputed to him. “Income may not be imputed to a parent unless the parent . . . is voluntarily unemployed or underemployed.” U.C.A. § 78-45-7.5(7)(a). Utah case law suggests that a parent is voluntarily unemployed or underemployed if, at least, some evidence suggests that the parent’s current, diminished income level resulted from “his personal preference or voluntary decisions,” instead of from “events beyond his control.” *Hall v. Hall*, 858 P.2d 1018, 1025 (Utah Ct. App. 1993).

131. The court has already indicated that it will not consider the pre-separation income from Novell; therefore, the court will consider the incomes earned by the respondent at the LDS Church, BYU, and Medicity. Again, those monthly incomes are: (1) \$5,577.00 gross per month

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the petitioner asserting this theory in trial. In addition, testimony was taken from the respondent in which he explained that he voluntarily resigned, rather than allowing himself to be fired by BYU.

(\$66,924.00 per year) at the LDS Church; (2) \$5,996.00 gross per month (\$71,952.00 per year) at BYU; (3) \$5,000.00 gross per month (\$60,000.00 per year) at Medicity.

132. The highest income of the three is the BYU income at \$5,996.00 gross per month. This is income which the respondent lost, because of activities which resulted in his excommunication from the LDS Church and his subsequent inability to hold a temple recommend. Unlike his voluntary departure from Novell for a lower-paying job in lieu of a possible layoff, his voluntary resignation from BYU was the result of his own actions. Therefore, the court finds that the respondent could, most likely, still be earning this income today, had he not voluntarily failed to satisfy the requirements for continued employment at BYU. Thus, the court finds that the respondent is voluntarily underemployed pursuant to U.C.A. § 78.45-7.5(7)(a).

133. Accordingly, the court finds that respondent has the ability to earn \$5,996.00 gross per month (\$71,952.00 per year).

134. The respondent married Brenda Louise Bruni in October 2005. As part of a pre-nuptial agreement signed by the respondent and Ms. Bruni, he pays her monthly house payment of \$752.00. See Trial Exhibit 30 and 35. He also pays her \$1,500.00 per month to help with living expenses.

135. Ms. Bruni's daughter, Sarah, has always lived with them. Ms. Bruni no longer receives any child support for Sarah, but Sarah pays her mother \$360.00 per month (and

sometimes less) to help with expenses. Ms. Bruni does not consider this regular income, as Sarah does not always have the money to pay. Ms. Bruni's older daughter and infant child also lived with them from February through April 2006, as did Ms. Bruni's mother from January or February 2006. Her mother has helped her financially at times, but it is not income that can be depended upon. Her mother has terminal cancer.

136. "In determining alimony, the income of any subsequent spouse of the payor may not be considered, except . . . [t]he court may consider the subsequent spouse's financial ability to share living expenses . . . ." U.C.A. § 30-3-5(8)(g)(iii)(A). This court does not find that Ms. Bruni's medical history, recent work history, and spotty income from her daughter justify great reliance upon Ms. Bruni's income for determining the appropriateness of alimony. The occasional gifts of money from Ms. Bruni's mother cannot be considered income for purposes of this determination. It is clear to this court that the respondent would have to pay at least \$752.00 per month to rent a decent place to live for himself, were he not remarried and living in Ms. Bruni's home. The payment of \$1,500 per month by the respondent to Ms. Bruni to help defray living expenses is certainly not unreasonable, given today's economy and the monthly expenses claimed by both the petitioner and the respondent. The money she brought from Oregon after her divorce is now gone, so she no longer has any reserve cash to supplement her income.

137. The court finds that, pursuant to U.C.A. § 30-3-5(8)(g)(iii)(A), there is no steady

income from Ms. Bruni that the court can include in its calculations. Ms. Bruni is not capable of sharing the living expenses with the respondent, other than the \$360.00 from her daughter, which only covers Sarah's expenses in the home (food, utilities, etc.).

#### **4. Length of Marriage**

138. The parties were married on November 22, 1986 and divorced on September 12, 2005. Thus, the parties were married two months short of 19 years.

#### **5. Whether Petitioner has Custody of the Minor Children**

139. As set forth above, the petitioner has full physical and legal custody of five minor children that require support. The respondent will be ordered to pay child support based upon his imputed income of \$5,996.00.

#### **6. The Fault of the Parties**

140. Although the petitioner only alleged "irreconcilable differences" her divorce petition, she testified that the divorce was caused by the respondent, because he sexually abused the children. She never amended the petition, and neither party testified as to when the sexual abuse of the children occurred.

141. The petitioner also testified that in January 2001 she placed the CINTAS stock into a joint account, due to pressure from the respondent during marriage counseling sessions, which had begun in December 2000. Neither party offered an explanation for their participation in marriage counseling at that time, which was many months prior to the parties' final separation

in October 2001.

142. Therefore, the court finds that it does not have enough clear testimony to place all of the blame on the respondent for this divorce, despite the unopposed testimony regarding the sexual abuse of the children. Thus, this court makes no finding that the respondent alone caused the marriage to terminate.

#### **7. Analysis under U.C.A. § 30-3-5(8)**

143. The petitioner requests that the court order the respondent to pay future alimony in the amount of \$3,259 per month for 19 years. The respondent withdrew his request for future alimony, but requested a credit for the alimony he has paid since the petitioner became employed in the spring of 2003.

144. While this is a marriage of almost 19 years' duration, the court can see no reason to award the petitioner alimony for another 19 years, especially when she is making more money than the respondent makes—even using the court-imputed income of \$5,996.00 per month for the respondent. Their incomes differ by \$673.00 per month and \$8,076.00 per year—with the advantage going to the petitioner. In addition, the parties had chosen to have the petitioner stay at home to raise the children and were living on only one income when they separated in October 2001. She did not return to full-time work until the spring of 2003 and later that year obtained her current employment with an income now of \$80,000.00 per year. Together they are bringing in \$151,952.00 per year (his imputed income of \$71,952.00, plus her income of \$80,000.00),



compared to the \$66,924.00 per year the respondent was making at the LDS Church when they separated in October 2001. Their collective income has more than doubled since their separation.

145. In addition, since the petitioner has the physical custody of the children, she will also be receiving \$4,560.00 per year from the respondent for child-care expenses, along with child support of \$16,728.00 per year (\$1,394.00 per month). This is a total of \$21,288.00, above and beyond her annual salary of \$80,000.00.

146. Were this court to award the petitioner the monthly alimony of \$3,259.00 she seeks, plus the monthly average child-care cost of \$380.00 awarded to her by the court (for a total of \$3,639.00), the respondent, according to his financial declaration, would have \$73.46 left of his net income to pay child support and the rest of his monthly expenses. See Exhibit 35.<sup>13</sup> This would be an unconscionable award to the petitioner.

147. So, does the petitioner deserve any alimony at all? This court finds that she did—during the time after the filing of this action before she obtained her new well-paying job. The parties' agreement in May 2002 was \$230 per month, which the parties, obviously, thought was appropriate at the time. The court also finds that \$230 per month was appropriate until the

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<sup>13</sup>The court has imputed income \$996.00 above what the respondent used in his financial declaration, so the court is not able to correctly estimate what his net income would be. He lost 29% of his real income through deductions; if the court used that same 29% and subtracted it from his imputed monthly income, that would leave him \$4,257.16 of his imputed income, for an increase of \$691.62 net. This is still not enough for him to live on and pay child support.

petitioner began her new job in November 2003. Therefore, the court awards the respondent a credit against other amounts due under these findings (or other judgments already awarded) from November 2003 through the time of trial, November 2006, inclusive. That would be calculated at \$230.00 x 37 months, for a total of \$8,510.00. Therefore, the respondent will receive a credit of \$8,510.00 for alimony already paid.

148. Because the parties' income and living circumstances are comparatively even and their collective income has more than doubled since the time of their separation in October 2001, the court denies the petitioner her request for future alimony and makes no order regarding future alimony.

## **XI. CHILD SUPPORT**

### **A. Respondent's Contempt for Unilaterally Changing Child Support**

149. In May 2002, the respondent was ordered to pay \$1,797.00 per month in child support beginning April 1, 2002. See May 2002 Order at ¶ 3. This amount was agreed upon by the parties, stipulated to in court, and based upon their incomes at the time.

150. At a hearing on June 24, 2004, the court ordered that the respondent's child support obligation would be reduced to \$1,169.00 per month for six children based upon the parties' current incomes. See Order signed August 5, 2004 at ¶ 4. This order was based upon petitioner's income of \$6,250.00 per month gross (\$75,000.00 per year) and respondent's income of \$5,750.00 per month (\$69,000.00 per year). The new amount was effective July 1, 2004.

151. No evidence was presented to the court that this order was ever modified, nor can the court find any orders of modification in the file.

152. From November 2005 through February 2006, the respondent paid child support of only \$1,090. See also Trial Exhibit 10. From March 2006 through May 2006 he only paid \$45 per month. Id. Finally, the respondent only paid \$840 per month in child support from June 2006 through August 2006. Id.

153. At a hearing on May 15, 2006, the parties stipulated that the petitioner had established a prima facie case regarding the respondent's contempt for underpaying his monthly child support obligations without leave of the Court. See Order signed July 28, 2006 at ¶ 5. The respondent reserved his right to dispute the contempt issue. At trial the respondent admitted that he was aware of the court orders regarding child support, and he failed to provide any evidence that the June 2004 order ever changed. Accordingly, the court holds the respondent in contempt for underpaying his child support payments without leave of the court.

#### **B. Respondent's Failure to Pay Child Support**

154. Respondent's child support obligation of \$1,169.00 per month was originally calculated for six minor children based on Petitioner's gross income of \$6,250 per month and Respondent's gross income of \$5,750 per month. See Order signed August 5, 2004 at ¶ 4. Although it is undisputed that one of the minor children turned 18 in October 2005, such does not automatically entitle the respondent to unilaterally reduce his child support obligations

without a court order. Not only did the number of minor children change, but the parties' gross monthly incomes were also different at that time. If the court allowed a party to unilaterally make changes to court-ordered obligations every time he or she determined a change in circumstance had occurred, it would nullify the authority of the court and render petitions to modify meaningless. Thus, the respondent did not have authority to unilaterally change (and underpay) his child support obligations.

155. As a result, on June 16, 2006, the court awarded the petitioner a judgment of \$2,248.00 in child support arrearages as of April 13, 2006. See Order signed July 28, 2006 at ¶ 1. In addition, on August 28, 2006, the court awarded the petitioner a judgment of \$2,103.00 in child support arrearages. See Order signed November 21, 2006 at ¶ 2.

156. Further, pursuant to the petitioner's testimony at trial, the court awards the petitioner a judgment against the respondent for \$489.68 in additional child support arrearages.

157. The court also finds that these judgments (and attorney's fees spent in obtaining these judgments) are classified as family support and/or maintenance, because child support is necessary to provide the children with a living. Moreover, the petitioner is awarded her attorneys' fees and costs incurred in obtaining these judgments against the respondent regarding child support and as a sanction for the respondent's contempt.

158. The respondent requested a credit for child support he paid while the petitioner was working from the spring of 2003 until it was actually reduced in July 2004. He also

requested to have child support recalculated from October 2005 to the present. However, the respondent failed to present any evidence regarding the petitioner's varying incomes during these time periods.

159. Therefore, the court has no evidentiary basis for determining what credit, if any, to which the respondent would be entitled. Rather than recalculating years of child support and attempting to determine both parties' income over the course of those months and years, the court in its discretion will simply determine child support from the time of trial going forward. Accordingly, the respondent is not entitled to a credit for child support paid from the spring of 2003 through July 2004, nor is he entitled to a recalculation of child support from October 2005 to the present.<sup>14</sup>

### **C. Child Support from October 2001 through April 2002**

160. Petitioner testified that before the parties separated, the respondent used to deposit his paycheck into the bill-paying account to cover family expenses. See Trial Exhibit 12. However, from the time the parties separated in October 2001 until the respondent was ordered to pay child support as of April 1, 2002, the respondent failed to provide any support to the family. Id. The petitioner testified that she was forced to solely provide for all of the children and family living expenses from her own funds during this time period even though she was not working. She now asks for back support for that six-month period.

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<sup>14</sup>Indeed, given the income imputed to the respondent, he might be less than satisfied with the result, were the court to recalculate all child support since the inception of this divorce action.

161. As far as the court can determine, this matter has never been brought before the court and has not been reserved by the petitioner. The court will not go back to the parties' separation to award back child support.

#### **D. Future Child Support**

162. Utah Code Ann. § 78-45-7.5(7)(a) allows this court to impute income to the respondent for purposes of child support if he is voluntarily unemployed or underemployed. Using the same analysis as it did in the above section on alimony, the court finds that the respondent is voluntarily underemployed pursuant to U.C.A. § 78-45-7.5(7)(a) and income shall be imputed to him at \$5,996.00 gross per month (\$71,952.00 per year) for purposes of calculating child support. Petitioner's income for purposes of child support shall be \$6,669 gross per month (\$80,000.00 per year). See Trial Exhibit 9. Child support shall be calculated for five minor children.

163. Since the time of trial, the Utah State Legislature has modified the child support income tables, effective April 30, 2007, for modified and future child support. Rather than estimating the base child support amount under the prior statute, the court has used the new statutory amount established for combined incomes of \$12,665.00 per month as a guideline. Using the above-listed incomes, the court has determined that (1) the combined income of the parties is \$12,665.00 per month; (2) the base child support for their income is \$2,967.00; (3) the petitioner makes 53% of the combined income, while the respondent makes 47% of the

combined income; (4) the parties' respective shares of the child support obligation are: petitioner, \$1,573.00 and respondent, \$1,394.00.

164. The court orders the respondent to pay \$1,394.00 for the support of the five minor children as of the first date of trial, November 22, 2006.

## **XII. STOCKS**

### **A. Novell Stock**

165. On May 7, 2002, the court awarded the petitioner the Novell stock as her sole and separate property, pursuant to a stipulation of the parties. See May 2002 Order at ¶ 9. The petitioner testified that she sold this stock in December 2004 and used the \$14,000.00 she received for attorney's fees. The respondent testified that he is not making a claim for this stock, but argues that the court "can consider this stock division in the other property divisions and do equity in this case." As the respondent provided no support for the petitioner during the early months of their separation, the court is not inclined to set off this stock and its value against any other property of the marriage. Thus, the respondent shall not receive a credit for this amount.

### **B. CINTAS Stock**

166. In 1997 the petitioner received a gift of CINTAS stock from her uncle; she placed the CINTAS stock in a private and separate account. See Trial Exhibit 2 at January 2001 statement. The respondent accused her, during a session of marriage counseling, of not being a "team player"--due to the separate CINTAS stock account. Because of that accusation, she felt

coerced to place the CINTAS stock into a joint account in January 2001. Id. at April 2001 statement. The respondent's name did not appear on the account until April 2001; however, the respondent had access to the account as early as January 2001.

167. In April 2001 the respondent borrowed against the CINTAS stock to purchase other stock without the petitioner's permission. Id. Subsequently, on July 19, 2001 the respondent sold the CINTAS stock for \$31,784.98. Id. at July 2001 Statement. However, the parties only received approximately \$18,000 in cash, since the remaining proceeds were used to pay off the respondent's outstanding debt for the purchase of the other stocks. The petitioner has not successfully demonstrated for the court that she did not receive any benefit from the remaining monies, which were used to buy other stocks.

168. The court finds that the CINTAS stock was the petitioner's separate property and that it retained its separate identity, despite being moved into a joint account. The respondent certainly did not contribute to the enhancement, maintenance, or protection of the stock or its value and did not, thereby, acquire an equitable interest in it. Oliekan v. Oliekan, 147 P.3d 464, 469 (Utah Ct. App. 2006), citing Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988). Therefore, the petitioner is entitled to a judgment of \$18,000.00 against the respondent.

169. The petitioner testified that she used the \$18,000 in cash to support the family between the time the parties separated in October 2001 until the May 2002 Order entered. See also Trial Exhibit 11 and 12. Since this \$18,000.00 was her sole and separate property and



marital funds should have been used to support the family instead, the court now awards her a judgment for \$18,000.00 and, further, finds that this \$18,000 is classified as family support and/or maintenance, since the funds were spent to support the family. This \$18,000.00 debt was incurred before the filing of the bankruptcy petition judgment.

**C. TwinLabs Stock**

170. Refer to “Home Equity Line of Credit/Second Mortgage” category above.

**XIII. MARITAL DEBTS**

**A. Pre-separation Debt**

171. After the parties separated, the petitioner transferred a joint, marital MBNA credit card debt of \$2,400.00 into her name only; the respondent does not dispute that the MBNA debt is a marital debt. The court awards judgment now against the respondent for \$1,200.00, as his share of his marital debt.

**B. Debt During Separation**

172. At approximately the same time the parties separated, the respondent took out a \$1,900.00 quick draw loan. The petitioner testified that she never saw this money, but that she ultimately paid this loan back. *The respondent failed to offer any evidence regarding this issue.* The court shall now awards the petitioner a judgment against the respondent for \$1,900.00. This debt was incurred before the filing of the bankruptcy petition judgment.

**XIV. TAX EXEMPTIONS**

173. The respondent requested that the parties split the tax exemptions every year. The court makes the following order: (1) The parties will split the tax exemptions each year; (2) If there is an odd number of children still receiving child support, the parties will alternate the extra deduction every other year with the petitioner being granted the odd-child exemption on odd-numbered years and the respondent being granted the exemption on even-numbered years. Therefore, for example, the petitioner will claim the odd-child exemption this year, 2007.

174. However, the respondent may not claim the children as tax exemptions unless he is current on his obligations to the children, pursuant to the appropriate statutes which deal with this issue.

## **XV. CONTEMPT**

### **A. Respondent's Contempt for Repeated Discovery Delays (i.e., Psychological Records, Financial Records, Changing Position Regarding Custody) and Failures to Comply with Court Orders**

175. Petitioner requested that the court find the respondent in contempt for his numerous discovery delays and repeated failures to comply with court orders; she also requested a monetary judgment against the respondent as a sanction. While the court holds both parties responsible for their failures to respond adequately to discovery requests, the court will not find the respondent in contempt for altering his goals in this litigation, i.e., supervised visitation, etc. The nature of divorce litigation is that, after discovery, court hearings, and negotiations, parties change their minds about what should be pursued during the litigation. Holding parties in

contempt for changes of strategy would stagnate divorce litigation and prevent settlement. In addition, the court will not hold the parties in contempt for failure to provide discovery regarding discovery which would have never been admitted, pursuant to state statutes, i.e., polygraph results. Finally, the court will not hold the respondent in contempt for filing his bankruptcy petition, as the court has no persuasive evidence before it that the only reason for filing the petition was to delay the divorce proceeding.

176. On November 8, 2006, the petitioner filed a Motion for Default Judgment and memorandum in support (“Default Judgment Memorandum”), wherein she outlined a history of the respondent’s repeated discovery delays and failures to comply with court orders. See November 8, 2006 Default Judgment Memorandum.

177. Beginning in July 2002, the petitioner served her first discovery request upon the respondent. See August 2002 Certificate of Service. However, in his August 2002 responses, the respondent failed to provide, among other things, a financial declaration (not produced until May 2003), monthly statements from his bank accounts and credit card accounts and complete information on his life insurance policy. See Respondent’s Answers attached to Default Judgment Memorandum as Exhibit A.

178. In September 2003, the petitioner served another discovery request upon the respondent to produce all test results for ISAT, sexual or psychological examinations and any tests with Dr. C.Y. Roby. See September 2003 Certificate of Delivery of Discovery. After five

months the respondent had failed to respond to this discovery request. See Pleadings. Thus, in March 2004, the Guardian ad Litem filed a Motion to Compel for the same test results that the petitioner was seeking. See March 2004 Motion to Compel.

179. By August 2004, the respondent still had not provided any further discovery. See Pleadings. Thus, the petitioner filed a Motion to Compel production of the sexual test results and financial information (i.e., a current financial statement, all bank and credit card information from September 2001 through June 2004 and a list of deposits and purchases). See August 19, 2004 Affidavit in Support of Motion to Compel. The respondent filed an opposition memorandum claiming he had already provided the requested discovery or the documents were not in his possession. See September 20, 2004 Response to Petitioner's Motion to Compel.

180. The parties came before the court in September 2004 on the petitioner's Motion to Compel. See September 21, 2004 docket entry. However, the day before the motion to compel hearing, the respondent provided documents that were partially responsive to the petitioner's first discovery request from more than two years ago. See Respondent's September 2004 Responses attached to Default Judgment Memorandum as Exhibit F. Further, the respondent also failed to produce the psychological and sexual test results as requested in September 2003. Id.

181. At the September 2004 motion to compel hearing, the court ordered the respondent to comply with "all [of Petitioner's] requested documents within two weeks",

including the production of signed releases for “all psychosexual records as well as the other requested discovery.” See September 21, 2004 Order at ¶ 3. However, the respondent provided the petitioner only one signed release for Dr. Roby. See Respondent’s October 6, 2004 Second Supplemental Response to Petitioner’s Request for Production of Documents attached to Default Judgment Memorandum as Exhibit H.

182. In October 2004, more than two weeks after the court’s order, the petitioner filed a notice with the court of the respondent’s refusal to sign the remaining releases, including a release for ISAT.<sup>15</sup> See October 12, 2004 Notice to Court of Willful Refusal. Immediately thereafter, the respondent filed a notice with the court claiming he had allegedly complied with the court’s order, when in reality he had only signed one release and failed to produce any other documents. See October 18, 2004 Notice to the Court of Respondent’s Compliance.

183. In March 2005, the petitioner filed a motion on order to show cause regarding discovery issues. See March 2005 Motion in Support of Order to Show Cause. She requested that the respondent show cause why he should not be sent to jail for his failure to produce, among other things, a current financial declaration, signed releases for various financial institutions, and a list of deposits and purchases. Id. at ¶¶ 3-7.

184. In April 2005, at the order to show cause hearing, the court again found that the

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<sup>15</sup> Petitioner’s Notice also indicated that she had not received a release for Dr. Roby. However, Petitioner filed her Notice on October 8 and Respondent indicates he filed his release for Dr. Roby on October 6. Thus, Petitioner had not yet received the release for Dr. Roby when she filed this notice.

respondent “has not been forthcoming in his efforts to comply with multiple discovery requests. However, to strike his pleadings would be a last resort by the Court.” See April 18, 2005 Order at ¶ 3. Also, the court again ordered the respondent to sign releases for all requested information (i.e., financial, psychosexual, etc.). Id. at ¶ 5. Further, the court “ordered Respondent to serve five (5) days in the Utah County Jail as a direct result of his continued non-compliance with discovery requests and contempt of court in this matter.” Id. at ¶ 8. However, the court stayed the sentence because the county jail was near capacity “and only for that reason.” Id. If the respondent failed to sign the releases within two weeks of the hearing, he was to be “ordered to serve these five (5) days in the Utah County Jail at the next hearing.” Id.

185. The following week, the respondent filed another notice of compliance with the court. See April 28, 2005 Notice of Compliance. Further, the respondent testified at trial that in a subsequent review hearing on May 16, 2005, he indicated to the court that all the releases had been signed and discovery was complete. However, the respondent admitted at trial that he had actually withdrawn his releases from Dr. Roby on May 9, 2005, almost two weeks before the review hearing at which the respondent indicated all releases had been signed. Although the respondent claimed at trial that he withdrew his release after “everything had been gotten a hold of by lawyers”, the petitioner testified that she did not receive the documents until November 2005.

186. In early April 2006, the petitioner sent another discovery request, but the

respondent failed to timely respond. See April 11, 2006 Certificate of Service of Discovery. In May 2006, the parties came before the court for yet another hearing on discovery. See May 15, 2006 Docket Entry.

187. Also in mid-May 2006, at a pretrial conference, the court ordered the respondent to respond to the petitioner's discovery requests and trial was rescheduled for August 2006. Finally, at the end of June, the respondent responded to Petitioner's April 2006 discovery. See Respondent's June 2006 Responses to Petitioner's Second Set of Interrogatories attached to Default Judgment Memorandum as Exhibit S. However, his answers to the interrogatories were incomplete and evasive. Id. For example, in response to Interrogatory No. 4, the respondent failed to identify the amounts in each account or the account numbers. Id. Also, in response to Interrogatory No. 5, the respondent did not identify a branch or account location for each account. Id. Most significant was the respondent's refusal to answer interrogatories 8-15 because they allegedly went beyond the amount of interrogatories allowed under the Utah Rules of Civil Procedure. Id. In addition, the respondent failed to produce any documents. Id.

188. In mid-July 2006, the petitioner filed a motion to compel the respondent to produce the remaining discovery. See July 13, 2006 Motion to Compel. Further, because the respondent had not provided the requested discovery by the end of July 2006, the petitioner was forced to file a motion to continue the trial. See July 28, 2006 Motion to Continue Trial Date.

189. At the phone conference, the court agreed to continue the trial again to November

2006. See July 31, 2006 Docket Entry. Also, at a subsequent pretrial hearing on August 24, 2006, the court again ordered the respondent to produce specified documents by September 24, 2006. See August 24, 2006 Order. Further, at this hearing, Judge Taylor stated:

Now, if I authorize Mr. Weckel to withdraw, I will not, I will not change these deadlines. . . . So when you go to hire new counsel, if you go hire new counsel, you must tell them, '*I have discovery deadlines in place . . . which will not be moved unless somebody dies . . . .*'

See August 24, 2006 Audio Recording.

190. The parties scheduled the depositions of the respondent and his new wife for October 11. See October, 2, 2006 Notice of Deposition. However, these depositions never took place due to the respondent's failure to timely produce discovery. On October 17, 2006 the parties had another phone conference with the court. See October 17, 2006 Docket Entry. Once again the court ordered the respondent to complete discovery. Id. The respondent's deposition was rescheduled for November 6, 2006. See October 25, 2006 Notice of Deposition. However, the respondent failed to timely produce the discovery as ordered by the court. See Pleadings and November 14, 2006 Order at ¶ 5.

191. Finally, on November 7, 2006 (two weeks before trial) the petitioner filed a Motion for Default Judgment because she had not yet received discovery from the respondent as ordered by the Court. See November 7, 2006 Motion for Default Judgment. This motion was ultimately denied; however, the court found that, because of the respondent's long-term failure to respond to discovery requests, a sanction of five (5) days in jail was appropriate. In her proposed



memorandum decision, the petition quotes an order which can not be found in the court file; however, the court's minute entry reflects the order of jail. The respondent was given time to purge that contempt by replying to the requested discovery. His request to continue the trial, due to the late entry of his new attorney, was denied. The court finds that, through the efforts of his new attorney, the respondent substantially complied with the discovery requests by the time of trial.

192. Accordingly, the court makes a finding that the respondent has displayed a distinct pattern of withholding, evading and avoiding discovery and that he has repeatedly failed to comply with court orders. The petitioner requests a judgment against the respondent in the amount of \$10,000 as a sanction for his behavior. This court does not believe that a \$10,000 sanction is appropriate in this matter. However, the court believes that the respondent's intentional efforts to thwart discovery have increased the petitioner's attorney's fees substantially and will, therefore, increase her award of attorney's fees accordingly.

#### **B. Petitioner is Not in Contempt**

193. Although not clearly requested, the court infers that the respondent sought to have the court also find the petitioner in contempt for allegedly failing to comply with discovery. It is undisputed that in early 2005, the petitioner did not produce documentation for two bank accounts. The petitioner testified that she did not produce said documents because the respondent had been using the information to interfere with her accounts. The court ordered on

March 7, 2005 that neither party could use the information received pursuant to discovery to interfere with any accounts of the other party. See March 7, 2005 Order at ¶ 1. The court also ordered the petitioner to produce the requested documents within two weeks, but the court never made a finding that the petitioner was in contempt. Id. at ¶ 2.

194. Subsequently, the respondent testified this same issue arose on February 23, 2006. However, this was merely a pretrial conference and no motions were pending regarding the petitioner's discovery. The respondent also testified that this same issue arose in the August 24, 2006 hearing. Yet, the only motion pending for that hearing was Petitioner's Motion to Compel Respondent to produce discovery. The respondent had not filed any motions claiming the petitioner failed to comply with discovery; the judge simply ordered the petitioner sua sponte to produce the same documents that the respondent was ordered to produce.

195. The court does note that there were delays in this case because the petitioner changed attorneys—one change resulting in a delay of trial.

196. Accordingly, the court does not find the petitioner in contempt, but notes that her hands are not completely clean.

### **C. Contempt for Individual Issues**

197. Refer to the individual issues above for the court's finding of contempt as to each issue. **XVI.**

### **ATTORNEYS' FEES**

#### **A. Fourth District Court Domestic Case**

198. Both parties requested that they be awarded attorneys' fees for this domestic matter. This court has authority to award attorneys' fees and costs "upon determining that the party substantially prevailed upon the claim or defenses." U.C.A. § 30-3-3(2). Further, an award of attorneys' fees must be based on the reasonableness of the fees requested, the financial need of the receiving spouse and the ability of the other spouse to pay." Wells v. Wells, 871 P.2d 1036, 1040 (Utah Ct. App. 1994) (citation omitted).

199. Has the petitioner substantially prevailed upon her claims? The court looks at the overall success of the petitioner on the important issues. The petitioner did successfully obtain imputation of the respondent's salary, but not the higher level she sought. While she was awarded somewhat less than she requested for child support, she was not at all successful in her quest for a exorbitant amount of future alimony. She wasted incredible amounts of time, energy, and attorney's fees on small issues, such as the gym equipment and the entertainment center. She was successful in her request regarding the CINTAS stock, but not regarding the Twin Labs stock. She was not awarded the \$64,000 she wanted for making the house payments, but she was awarded a substantial amount of the money she put into the repair and maintenance of the marital home. She was also rewarded some reimbursement for the home equity line of credit. She was not awarded the child-care expenses she sought. Overall, the petitioner was not successful in her presentation of many of the major issues before this court.

200. The court must also evaluate the reasonableness of the fees, the financial needs of the petitioner, and the ability of the respondent to pay her fees. The court finds that the fees incurred by the petitioner are not reasonable, but are truly beyond reason for a marital estate of this size. The court is appalled at the effort that went into minor areas, such as the \$180.00 in used gym equipment and the used \$75.00 entertainment center. Some of the petitioner's requests were absurd, such as the amount requested for alimony and reimbursement for all of the house payments. The respondent should not have to pay for attorney's fees incurred in pursuing such unreasonable requests.

201. However, the court does consider reasonable an award of attorney's fees based upon the respondent's pattern of obstructing the discovery process. The failure of the respondent to timely and fully respond to the petitioner's discovery requests has certainly increased her attorney's fees in this matter. See the discussion on contempt.

202. As for the financial needs of the petitioner, she makes more money than the respondent and will be receiving monthly financial help from him. She is more than capable of paying her own attorney's fees, as is the respondent capable of paying his own fees.

#### **B. Previous Orders to Show Cause**

203. An award of some of the petitioner's attorneys' fees could also be independently based upon every order to show cause in which she substantially prevailed:

- In the May 2002 Order, the petitioner was awarded custody, child support, health insurance, car insurance, Novell stock, child care expenses. See May 7, 2002 Order.

- In the June 2004 Order, the petitioner was awarded reimbursement for reasonable child care expenses. See June 24, 2004 Order. Also, the respondent's request to alter alimony was denied because he had not completed psychosexual testing as previously ordered by the Court. Id.
- In the September 2004 Order, the respondent was ordered to produce requested documents within two weeks and to sign the necessary releases. See September 21, 2004 Order. The petitioner also received a judgment for unpaid child care expenses. Id.
- In the December 2004 Order, the respondent was ordered to sell the RV and his request to stay garnishment proceedings was denied. See December 2, 2004 Order.
- In the August 28, 2006 Order, the court entered a judgment against the respondent for unpaid child support, medical insurance and child care expenses. See August 28, 2006 Order. Further, the court made a finding that "Petitioner's attorney substantially prevailed on the issues before the court." Id. at ¶ 5.

Since the issue of attorneys' fees was reserved for each of these matters, the court now finds that the petitioner's general award of attorneys' fees is also based on the petitioner's success in each of these individual orders to show cause.

204. Further, the court already awarded the petitioner attorneys' fees in the April 2005 and June 2006 Orders. See April 18, 2005 Order at ¶ 7 and June 15, 2006 Order at ¶ 4. Rather than require an individual affidavit of attorneys' fees for each order to show cause, the court will accept a final, all-inclusive affidavit of fees incurred by the petitioner throughout this litigation.

### **C. Conclusion as to Petitioner's Divorce Litigation Fees**

205. The court finds that the petitioner was not substantially successful on the issues she presented to the court, that the total bill for attorney's fees and costs of \$83,349.61 was not

reasonable, and that she makes more money than the respondent and will be receiving financial help from him on a monthly basis. On the other hand, the respondent's efforts to avoid or delay discovery have cost the petitioner a great deal in attorney's fees and delays. Therefore, the court finds it appropriate that the respondent should pay for 15% of the petitioner's attorney's fees, for a total of \$12,502.00. The court will allow the respondent to pay this amount, with the statutory interest, over the next 10 years at the rate of \$1,250.24 per year, plus the appropriate interest.

### **C. Bankruptcy Attorneys' Fees**

206. Petitioner requested that a judgment enter against the respondent in this matter for attorneys' fees she has incurred in the Bankruptcy Court. In Condie v. Condie, 139 P.3d 271 (Utah Ct. App. 2006), the Court of Appeals explained that "as a general rule, attorney fees are not awardable under federal bankruptcy law [in a bankruptcy action] for enforcement of obligations contained in a divorce decree." Id. at 275. Thus, the Court of Appeals held that the trial court erred in ruling that the wife should have requested her fees in the Bankruptcy Court. Instead, the Court of Appeals' holding implied that the former wife must seek an award in state court for attorneys' fees incurred in a bankruptcy action. Id. at 276. See also In re Marriage of Wright 841 P.2d 358 (Colo. Ct. App. 1992).

207. Further, the Court of Appeals explained that the state trial court had authority to award bankruptcy attorneys' fees to the former wife pursuant to UTAH CODE. ANN. § 30-3-3(2), which provides that, "[i]n any action to enforce an order of . . . child support, alimony, or

division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense.”

208. In compliance with U.C.A. § 30-3-3(2), the petitioner testified that she filed an adversarial proceeding against the respondent in the bankruptcy court in order to save the marital home. Ms. Drake, the petitioner’s bankruptcy attorney, also testified that the petitioner filed the adversarial proceeding to protect the marital home and to prevent the respondent from discharging his family debts to the petitioner (e.g., child support, alimony, etc.). Similar to Condie, Ms. Drake confirmed that the petitioner will not receive an award of her bankruptcy attorneys’ fees in the Bankruptcy Court.

209. Using the same analysis as above, this court finds that the petitioner was somewhat substantially successful on the bankruptcy-related issues of child support, but not on alimony. The issue of the marital home was not litigated before this court, while the issues of personal property were—to some small extent.

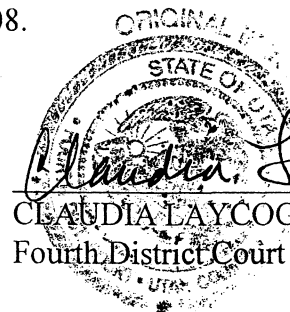
210. Accordingly, this court awards the petitioner her attorneys’ fees incurred in the bankruptcy action at the same rate as in the divorce case proper—10%. See U.C.A. § 30-3-3(2). See also Condie, 139 P.3d at 274-76. In addition, Ms. Drake submitted an affidavit of attorneys’ fees for the bankruptcy case in the amount of \$26,401.00 as of December 12, 2006. See Trial Exhibit 28. Ms. Drake testified about her experience in bankruptcy law and stated that her fees were reasonable for someone with her experience in Salt Lake County. This court finds that the

bankruptcy attorneys' fees incurred by the petitioner are reasonable. The court orders the respondent to pay the sum of \$3,960.00 in attorney's fees for Ms. Drake's work in the bankruptcy matter. The court will allow the respondent to pay this amount, with the statutory interest, over the next 5 years at the rate \$792.00 per year, plus the appropriate interest.

**D. Attorney's Fees for the Respondent**

211. As the respondent has not requested that the petitioner pay his attorney's fees, the court makes no corresponding order, nor does the court believe that such an order would be appropriate.

DATED this 24<sup>th</sup> day of June, 2008.

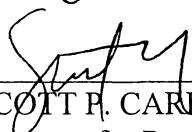
 ORIGINAL  
STATE OF UTAH  
*Claudia Laycock*  
CLAUDIA LAYCOCK  
Fourth District Court Judge



**U.R.C.P. RULE 7(f) NOTICE**

The foregoing DECREE OF DIVORCE has been submitted to the Court for execution and entry. Rule 7(f), of the Utah Rules of Civil Procedure, allows five (5) days following hand-delivery, or five (5) days plus three (3) days for mailing if service by mail, for opposing counsel or opposing parties to submit notice of objection. If such objection as to form is not received within the prescribed time period, the Order will be submitted for signing by the Court.

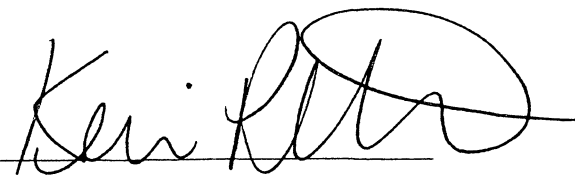
DATED this 11<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
SCOTT P. CARD  
Attorney for Respondent

**MAILING CERTIFICATE**

I certify that I mailed the foregoing postage prepaid this 12 day of June, 2008 to the following:

Clark R. Nielsen  
Kathryn J. Steffey  
SMITH HARTVIGSEN, PLLC  
215 South State Street, Suite 650  
Salt Lake City, UT 84111

  
\_\_\_\_\_

Tab D

IN THE FOURTH JUDICIAL DISTRICT COURT, PROVO  
UTAH COUNTY, STATE OF UTAH

-o0o-  
VALERIE CONNELL, )  
 )  
Petitioner, ) Case No. 024400765 DA  
 )  
vs. ) ORAL ARGUMENTS  
 )  
HAROLD CONNELL, ) 11/14/06  
 )  
Respondent. )  
-o0o-

BE IT REMEMBERED that on the 14th day of  
November, 2006, commencing at the hour of 10:22 a.m., the  
above-entitled matter came on for hearing before the HONORABLE  
CLAUDIA LAYCOCK, sitting as Judge in the above-named Court for  
the purpose of this cause, and that the following proceedings  
were had.

-o0o-



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1

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1 motion. Something needs to be done to remind him to comply  
2 with these Court orders and it's just been a history that's  
3 gone on too long.

4 THE COURT: All right. As I indicated off the  
5 record before we began today, I've spent a great deal of time  
6 looking at the files, I've completely reviewed the docket in  
7 this matter and have read all of the minute entries that are  
8 part of the docket, looked at the orders and read the  
9 memoranda of the parties very carefully.

10 I am not going to grant the ultimate desire of the  
11 petitioner today, but I am going to impose a sanction that was  
12 reserved earlier. I am persuaded that the petitioner comes  
13 with slightly unclean hands. I don't find it persuasive that  
14 the petitioner had the records that were ordered on August  
15 24th of 2006, ready, and instead of mailing them, expected the  
16 respondent to come and get them and then holds the respondent  
17 responsible for not coming and picking them up. That's  
18 absurd.

19 The order from Judge Taylor at that hearing was for  
20 both parties to produce the documents and get them to the  
21 other side. So, I find that the petitioner is partly at  
22 fault. And that's why I don't take the extreme, very extreme  
23 sanction of defaulting the respondent.

24 On the other hand, I am persuaded that the  
25 respondent's hands are very unclean. There is a pattern that

1 exists throughout this litigation. There have been motions to  
2 compel from both sides, I see that in the record, I understand  
3 that clearly; but the unvarying pattern in this case has been  
4 that the respondent has been trying to duck and to evade and  
5 to avoid and to withhold and I think much of what has been  
6 said on behalf of the petitioner is well taken and well-  
7 deserved.

8           With or--with or without his attorney or the help of  
9 his previous attorneys, and I, too, make a distinction as to  
10 what's happened before and after Mr. Card's appearance in this  
11 matter, the defendant has not complied and has failed to do  
12 things which he could have easily done, or even have done with  
13 some work. Discovery takes effort by the client. The  
14 attorney can't do it all and the client can't sit back and  
15 say, that's too much work for me to do, which seems to have  
16 been part of the excuse here, too.

17           There was a previous order of five days in jail and  
18 I think it's time now, that based on the lack of cooperation  
19 historically in the case and most specifically since August  
20 24th when Judge Taylor in that hearing went through one item  
21 at a time with the parties and made specific orders one after  
22 another, that there would be compliance; since that time, the  
23 respondent has sat back and not done what Judge Taylor told  
24 him to do. And based on that, I think it's time for the  
25 sanction of the five days in jail to be issued.

1           Now, the problem, as I see, is that today's the 14th  
2 and this trial is to start the 22nd, which by my calculations  
3 would be one week from tomorrow; right?

4           MR. CARD:   Correct.

5           THE COURT:   With the second day of trial being  
6 December 8th.  I'm not going to continue the trial.  Judge  
7 Taylor made an order that he set in concrete.

8           If it turns out that we get to trial and the  
9 petitioner is unable to present the necessary evidence based  
10 on the defendant's failure to provide the necessary evidence  
11 through the discovery, I'm going to make the ruling that the  
12 respondent will be precluded from defending on that issue; so,  
13 in effect, they get part of what they want.  But if the  
14 respondent wants to be able to show where the funds went from  
15 the sale of various personal items, and I assume we're talking  
16 about the R.V. and some other things here, then he'd better  
17 get the proof to the other side of what he thinks he did with  
18 that money but fast.

19           I am going to reserve so that we can get to the real  
20 issues, I'm going to reserve for a later date, these issues of  
21 contempt and attorney's fees, for prior contempt issues and  
22 for the trial itself.  That way, we can spend the day-and-a-  
23 half that we've got on the substantive issues, rather than re-  
24 hashing history.  Okay?

25           MS. TEGEDER:  Your Honor, sorry to interrupt.  Just

Tab E

UTAH CODE, 1953  
TITLE 30. HUSBAND AND WIFE  
CHAPTER 3. DIVORCE

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30-3-3 Award of costs, attorney and witness fees --Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

History: C. 1953, 30-3-3, enacted by L. 1993, ch. 137, § 1; 2001, ch. 255, § 3.

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and Reenactments. --Laws 1993, ch. 72, § 10 repeals former § 30-3-3, Utah Code Annotated 1953, allowing a court to order either party to pay for the separate support and maintenance of the adverse party and the children, and enacts the present section, effective May 3, 1993.

Amendment Notes. --The 2001 amendment, effective April 30, 2001, substituted "parent-time" for "visitation" in Subsections (1) and (2).

NOTES TO DECISIONS

Compiler's Notes. --In 1997, the Utah legislature changed the designation of parties in domestic relations cases from "plaintiff" and "defendant" to "petitioner" and "respondent." Annotations from decisions before the amendments will not reflect these changes in terminology.



## Tab F

UTAH CODE, 1953  
TITLE 30. HUSBAND AND WIFE  
CHAPTER 3. DIVORCE

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30-3-5 Disposition of property --Maintenance and health care of parties and children --  
Division of debts --Court to have continuing jurisdiction -- Custody and parent-time --  
Determination of alimony --Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) (a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter.

(5) If a petition for modification of child custody or parent-time provisions of a court

order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(6) If a petition alleges substantial noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

(7) (a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (7)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (7).

- (A) The court may consider the subsequent spouse's financial ability to share living expenses.
- (B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.
- (h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.
- (8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.
- (9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

History: R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1; 1991, ch. 257, § 4; 1993, ch. 152, § 1; 1993, ch. 261, § 1; 1994, ch. 284, § 1; 1995, ch. 330, § 1; 1997, ch. 232, § 4; 1999, ch. 168, § 1; 1999, ch. 277, § 1; 2001, ch. 255, § 4.

#### NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. --The 1994 amendment, effective May 2, 1994, designated Subsection (4) as (4)(a) and added Subsection (4)(b).

The 1995 amendment, effective May 1, 1995, deleted a provision from Subsection (3) for support and maintenance orders; deleted former Subsections (5) and (6), providing that alimony terminates upon remarriage, or cohabitation with a member of the opposite sex, by the payee; added Subsections (7) to (9); renumbered former Subsections (7) and (8) as (5) and (6); and made stylistic changes.

The 1997 amendment, effective July 1, 1997, substituted "Recovery Services" for "Parts 4 and 5" in Subsection (1)(d) and deleted Subsection (1)(e) which provided for an assesment against the obligor for a check handling fee.

The 1999 amendment by ch. 168, effective May 3, 1999, inserted "or death" in the first sentence of Subsection (8) and made a stylistic change.

The 1999 amendment by ch. 277, effective May 3, 1999, added Subsections (7)(a)(v) through (7)(a)(vii) and made stylistic changes.

The 2001 amendment, effective April 30, 2001, in Subsection (4)(a), substituted "parent-time rights of parents and visitation rights of grandparents" for "visitation rights of parents, grandparents"; in Subsection (4)(b), added "parent-time or" in two places; in Subsection (5), substituted "parent-time" for "visitation"; in Subsection (6), substituted "parent-time order by a parent, or a visitation order by" for "visitation order by a parent" and added "or parent-time" in two places; and made punctuation changes.

Compiler's Notes. --Laws 1995, ch. 330, which amended this section, provides in § 2 that

the Legislature does not intend that termination of alimony based on cohabitation, in accordance with Subsection (9), "be interpreted in any way to condone such a relationship for any purpose."

Cross-References. --Grandparents' visitation rights, § 30-5-2.  
Uniform Premarital Agreement Act, Title 30, Chapter 8.

#### NOTES TO DECISIONS

Compiler's Notes. --In 1997, the Utah legislature changed the designation of parties in domestic relations cases from "plaintiff" and "defendant" to "petitioner" and "respondent." In 2001, the legislature designated parental visitation as "parent-time." Annotations from decisions before the amendments will not reflect these changes in terminology.